No. 84-127-CFX
Status: GRANTED

Title: Richardson-Merrell, Inc., Petitioner
v.
Anne Elisabeth Koller, etc., et al.

Docketed:
July 24, 1984

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Walsh, Lawrence E.

Counsel for respondent: Weinberg, Robert M.

Entry	Date	Note	Proceedings and Orders
1	Jul 24 1984	G	Petition for writ of certiorari filed.
3	Aug 11 1984		Order extending time to file response to petition until September 22, 1984.
4	Sep 22 1984		Brief of respondents Koller, Anne E., et al. in opposition filed.
5	Sep 25 1984		Reply brief of petitioner Richardson-Merrell, Inc. filed.
6	Sep 26 1984		DISTRIBUTED. October 12, 1984
7	Oct 9 1984	X	Supplemental brief of petitioner Richardson-Merrell, Inc. filed.
8	Oct 9 1984	X	Supplemental brief of respondents Anne E. Koller, et al. filed.
9	Oct 15 1984		Petition GRANTED.
			**********
10	Nov 29 1984		Joint appendix filed.
11	Nov 29 1984		Brief of petitioner Richardson-Merrell, Inc. filed.
13	Dec 11 1984		Order extending time to file brief of respondent on the merits until January 15, 1985.
14	Jan 4 1985		SET FOR ARGUMENT. Tuesday, February 26, 1985. (2nd case.)
15	Jan 14 1985		Record filed.
16	Jan 15 1985		Brief amicus curiae of Washington Post, et al. filed.
17	Jan 17 1985		Brief of respondents Anne E. Koller, et al. filed.
18	Jan 22 1985		CIRCULATED.
19	Jan 28 1985	X	Reply brief of petitioner Richardson-Merrell, Inc. filed.
20	Feb 25 1985		Record filed.
21	Feb 25 1985		Certified copy of original supplemental record on appeal received. (4 boxes).
22	Feb 26 1985		ARGUED.

No. 84-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARDSON-MERRELL INC.,

Petitioner,

v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. If a Federal District Court finds that an attorney has been guilty of misconduct in a case pending before it, may it disqualify the attorney from further participation in the case?

2. In such a case, are the District Court's findings of fact protected by the clearly erroneous rule, and is its determination subject to reversal only for abuse of discretion?

3. May an attorney be disqualified for eve of jury selection dissemination to the most widely circulated local newspaper of material previously ruled inadmissible and prejudicial (a) with intent to circumvent the orders of the District Court; (b) with intent to prejudice the defendant's case; and (c) after similar conduct in a previous case?

4. Is an order disqualifying counsel in a civil case subject to interlocutory appeal in light of *Flanagan* v. *United States*, 104 S. Ct. 1051 (1984)?*

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* The caption of the case in this Court contains the names of all parties to the proceedings in the court below. Petitioner (now known as Merrell Dow Pharmaceuticals Inc.) is a subsidiary of The Dow Chemical Company. The following subsidiaries and affiliates of The Dow Chemical Company have outstanding securities in the hands of the public: Dow Banking Corporation; Dow Chemical Iberica S.A.; Gruppo Lepetit S.p.A.; Ivon Watkins-Dow Limited; Laboratorios Industriales Farmaceuticos Ecuatorianos; Merrell Toraude et Compagnie; Oronzio De Nora Impianti Elettrochimici S.A.; and Pacific Chemicals Berhad.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Opinions Below	2
Jurisdiction	2
Statute and Rules Involved	2
Statement of the Case	2
A. The Facts Found by the District Court	3
1. Butler: Knowing Release of Inadmissible Evidence to Prejudice Defendant's Case and Circumvent the Court's Rulings	3
2. Allis: Attempt to Thwart a True Investigation of a Crucial Witness in This Case	7
3. The Appropriateness of Disqualification	11
B. The Facts as Refound by the Court of Appeals	11
1. Butler: "Some Question" as to Bad Intent	12
2. Allis: "On the Whole," No Misconduct	13
C. The Decision of the Court of Appeals	14
Reasons for Granting the Writ	15
1. The Decision Below Wrongly Abolishes as a Matter of Law the Established Authority of the District Courts to Disqualify Counsel for Misconduct	15

PAGE

2. The Court Below Brushed Aside the Clearly Erroneous Rule and the Abuse of Discretion Standard of Review 17
   a. The Clearly Erroneous Rule 17
   b. The Abuse of Discretion Standard 19
3. The Court Below Wrongly Held That an Attorney May Not Be Disqualified for Releasing Material Which Has Been Ruled Inadmissible With Intent to Circumvent the Ruling and to Prejudice an Opponent 21
4. Attorney Disqualification Orders in Civil Cases Are Not Subject to Interlocutory Appeal Under *Flanagan* v. *United States*, 104 S. Ct. 1051 (1984) 25

CONCLUSION 29

APPENDIX

Opinion of the Court of Appeals Dated May 29, 1984 ..... 1a

Amendments to the Opinion of the Court of Appeals Dated July 16, 1984 ..... 70a

Opinion of the District Court Dated January 6, 1984 ..... 72a

Order of the District Court Dated January 6, 1984 79a

Notice of the Court of Appeals Entry of Judgment Dated May 29, 1984 ..... 81a

Order of the Court of Appeals Denying Petition for Rehearing Dated July 17, 1984 ..... 82a

PAGE

Order of the Court of Appeals Denying Petition for Rehearing *En Banc* Dated July 17, 1984 .. 84a

Statute and Rules Involved 86a

TABLE OF AUTHORITIES

Cases

Board of Education v. *Nyquist*, 590 F.2d 1241 (2d Cir. 1979) 14, 17

City of Cleveland v. *Cleveland Electric Illuminating Co.*, 440 F. Supp. 193 (N.D. Ohio 1976), *aff'd*, 573 F.2d 1310 (6th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978) 15

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) 25-27

Duncan v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981) 25

Dunton v. *County of Suffolk*, 729 F.2d 903 (2d Cir. 1984) 15

Firestone Tire & Rubber Co. v. *Risjord*, 449 U.S. 368 (1981) 25

Flanagan v. *United States*, 104 S. Ct. 1051 (1984) i, 25-27

Freeman v. *Chicago Musical Instrument Co.*, 689 F.2d 715 (7th Cir. 1982) 25

Geders v. *United States*, 425 U.S. 80 (1976) 16

General Mill Supply Co. v. *SCA Services, Inc.*, 697 F.2d 704 (6th Cir. 1982) 19, 25

Gilbert v. *City of Little Rock*, 622 F.2d 386 (8th Cir. 1980) 15, 19

PAGE

Glueck v. *Jonathan Logan, Inc.*, 653 F.2d 746 (2d Cir. 1981) 25
Gough v. *Perkowski*, 694 F.2d 1140 (9th Cir. 1982) 25
Greitzer & Locks v. *Johns-Manville Corp.*, 710 F.2d 127 (4th Cir.), *cert. denied*, 459 U.S. 1010 (1982) 25
Groper v. *Taff*, 717 F.2d 1415 (D.C. Cir. 1983) 15, 20, 25
Hull v. *Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975) 15, 19
In re Asbestos Cases, 514 F. Supp. 914 (E.D. Va. 1981), *aff'd sub nom. Greitzer & Locks* v. *Johns-Manville Corp.*, 710 F.2d 127 (4th Cir.), *cert. denied*, 459 U.S. 1010 (1982) 15
In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 658 F.2d 1355 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982) 25
In re Gopman, 531 F.2d 262 (5th Cir. 1976) 19
In re Richardson-Merrell Inc. "Bendectin" Products Liability Litigation, MDL No. 486 2
Interco Systems, Inc. v. *Omni Corporate Services, Inc.*, 733 F.2d 253 (2d Cir. 1984) 26
Inwood Laboratories, Inc. v. *Ives Laboratories, Inc.*, 456 U.S. 844 (1982) 18
Irvin v. *Dowd*, 366 U.S. 717 (1961) 22
Johnson v. *SmithKline Corp.*, Ariz. Super. Ct., Maricopa County, Cause No. 266659 6
Kelley v. *Southern Pacific Co.*, 419 U.S. 318 (1974) 18
Kesselhaut v. *United States*, 555 F.2d 791 (Ct. Cl. 1977) 15

PAGE

Kevlik v. *Goldstein*, 724 F.2d 844 (1st Cir. 1984) 15, 19
Kreda v. *Rush*, 550 F.2d 888 (3d Cir. 1977) 15
Krulewitch v. *United States*, 336 U.S. 440 (1949) 22

Landmark Communications, Inc. v. *Virginia*, 435 U.S. 829 (1978) 24
Laughlin v. *Eicher*, 145 F.2d 700 (D.C. Cir. 1944), *cert. denied*, 325 U.S. 866 (1945) 15

Marshall v. *United States*, 360 U.S. 310 (1959) .. 22
Mekdeci v. *Merrell National Laboratories*, 711 F.2d 1510 (11th Cir. 1983) 11
Musicus v. *Westinghouse Electric Corp.*, 621 F.2d 742 (5th Cir. 1980) 15

National Hockey League v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) 20-21
NCK Organization Ltd. v. *Bregman*, 542 F.2d 128 (2d Cir. 1976) 19
Nebraska Press Ass'n v. *Stuart*, 427 U.S. 539 (1976) 24
Norton v. *Tallahassee Memorial Hospital*, 689 F.2d 938 (11th Cir. 1982), *rehearing denied*, 700 F.2d 617 (11th Cir. 1983) 19, 25
Novo Terapeutisk Laboratorium A/S v. *Baxter Travenol Laboratories, Inc.*, 607 F.2d 186 (7th Cir. 1979) 19

Patton v. *Yount*, 52 U.S.L.W. 4896 (U.S. June 26, 1984) 22
Paul E. Iacono Structural Engineer, Inc. v. *Humphrey*, 722 F.2d 435 (9th Cir.), *cert. denied*, 104 S. Ct. 162 (1983) 19
Pullman-Standard v. *Swint*, 456 U.S. 273 (1982) .. 18

Redd v. *Shell Oil Co.*, 518 F.2d 311 (10th Cir. 1975) 15, 19

PAGE

Richardson v. *Hamilton International Corp.*, 469 F.2d 1382 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973) 15, 19
Richmond Hilton Associates v. *City of Richmond*, 690 F.2d 1086 (4th Cir. 1982) 19
Roadway Express, Inc. v. *Piper*, 447 U.S. 752 (1980) 16
Schloetter v. *Railoc of Indiana, Inc.*, 546 F.2d 706 (7th Cir. 1976) 15, 19
Sheppard v. *Maxwell*, 384 U.S. 333 (1966) 24
State v. *Kavanaugh*, 52 N.J. 7, 243 A.2d 225, *cert. denied*, 393 U.S. 924 (1968) 23-24
Trone v. *Smith*, 621 F.2d 994 (9th Cir. 1980) ... 15
United States v. *Clarkson*, 567 F.2d 270 (4th Cir. 1977) 19
United States v. *Dinitz*, 538 F.2d 1214 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977) 15
United States v. *Hobson*, 672 F.2d 825 (11th Cir.), *cert. denied*, 459 U.S. 906 (1982) 15
United States v. *Madsen*, 148 F. Supp. 625 (D. Alaska 1957) 16
United States v. *Miller*, 624 F.2d 1198 (3d Cir. 1980) 19
United States v. *Snyder*, 707 F.2d 139 (5th Cir. 1983) 15, 19
United States v. *United States Gypsum Co.*, 333 U.S. 364 (1948) 18
United States v. *Yellow Cab Co.*, 338 U.S. 338 (1949) 18
Viereck v. *United States*, 130 F.2d 945 (D.C. Cir. 1942), *rev'd*, 318 U.S. 236 (1943) 15-16
Woods v. *Covington County Bank*, 537 F.2d 804 (5th Cir. 1976) 15

PAGE

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) 18

Statutes and Rules

28 U.S.C. § 1291 ..... 2, 86a
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1332 3
28 U.S.C. § 2101(c) 2
Fed. R. Civ. P. 52(a) 2, 17-18, 86a-87a
Rule 1-4, United States District Court for the District of Columbia 2, 87a-90a
Rule 4-3(IV), United States District Court for the District of Columbia 2, 90a
Rule 4-3(VIII), United States District Court for the District of Columbia 2, 91a
District of Columbia Code of Professional Responsibility Disciplinary Rule 1-102(A) 2, 91a
District of Columbia Code of Professional Responsibility Disiplinary Rule 2-110(B)(1) 2, 91a-92a
District of Columbia Code of Professional Responsibility Disciplinary Rule 5-105(D) 2, 92a
District of Columbia Code of Professional Responsibility Disciplinary Rule 7-102 .....2, 92a-94a
District of Columbia Code of Professional Responsibility Disciplinary Rule 7-106 .....2, 94a-95a
District of Columbia Code of Professional Responsibility Disciplinary Rule 7-107(H) (ABA Canons of Professional Ethics, Canon 20) 2, 12-13, 21, 95a-96a
District of Columbia Code of Professional Responsibility Rule 7-107(I) 2, 96a

PAGE

District of Columbia Code of Professional Responsibility Rule 7-107(J) 2, 96a
District of Columbia Code of Professional Responsibility Disciplinary Rule 7-108(A) 2, 21, 96a
District of Columbia Code of Professional Responsibility Disciplinary Rule 7-108(B) 2, 96a-97a

Cal. Penal Code § 632 (West Supp. 1984) ..2, 97a-99a
Cal. Penal Code § 633.5 (West 1970) 2, 99a

Other Authorities

ABA Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (1970) 16

IN THE

Supreme Court of the United States

October Term, 1984

No. 84-

RICHARDSON-MERRELL INC.,

Petitioner,

v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Richardson-Merrell Inc., the defendant below, respectfully prays that a writ of certiorari issue to review the decision rendered by the United States Court of Appeals for the District of Columbia Circuit (Circuit Judges Wald and Mikva, with District Judge Richey concurring in a separate opinion), which reversed an order of the United States District Court for the District of Columbia (Honorable Norma Holloway Johnson, U.S.D.J.) disqualifying respondents James G. Butler and Nicholas R. Allis as two of the trial counsel for plaintiffs in this action.

Opinions Below

The opinions delivered in the Court of Appeals are not yet reported, and are set forth in the Appendix (1a-71a). The Memorandum Opinion of the District Court is not yet reported, and is set forth in the Appendix (72a-78a).

Jurisdiction

The judgment of the Court of Appeals was dated and entered May 29, 1984 (81a). Petitioner's timely petition for rehearing and suggestion for rehearing en banc were denied by the Court of Appeals on July 17, 1984 (82a-85a). The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. §§ 1254(1), 2101(c).

Statute and Rules Involved

28 U.S.C. § 1291; Fed. R. Civ. P. 52(a); Rules 1-4, 4-3(IV), and 4-3(VIII) of the United States District Court for the District of Columbia; Disciplinary Rules 1-102(A), 2-110(B)(1), 5-105(D), 7-102, 7-106, 7-107(H)-(J), and 7-108(A)-(B), of the District of Columbia Code of Professional Responsibility; and Sections 632 and 633.5 of the California Penal Code are set forth verbatim in the Appendix (86a-99a).

Statement of the Case

This is a product liability case in which the plaintiffs claim that defendant's drug Bendectin caused the birth defects of the infant plaintiff, Anne Elisabeth Koller.*

* The plaintiffs in this action are now included among members of a class defined on June 18, 1984 by the United States District Court for the Southern District of Ohio in *In re Richardson-Merrell Inc. "Bendectin" Products Liability Litigation*, MDL No. 486. A proposed settlement of that class action has been filed with the court, but notice thereof has not yet been sent to class members. The plaintiffs in this action have not yet taken any position with respect to the proposed class action settlement.

Among the central issues in the case are whether Bendectin actually causes birth defects, and whether Mrs. Koller in fact took Bendectin during the first 40 days of pregnancy (JA602-JA614*).

The action was commenced on May 19, 1980 (JA2). The basis for federal jurisdiction was diversity of citizenship under 28 U.S.C. § 1332 (JA77). Plaintiffs were represented by eight attorneys (JA1, JA2, JA20, JA21, JA37, JA64). On January 6, 1984, before the case proceeded to trial, the District Court found after full hearings that two of plaintiffs' counsel, James G. Butler and Nicholas R. Allis, were guilty of misconduct in connection with the action, and held that they should be disqualified from further participation in the case (72a-80a).

A. The Facts Found by the District Court

The District Court's action was based upon its findings concerning distinct acts of misconduct by Butler and Allis.

1. *Butler: Knowing Release of Inadmissible Evidence to Prejudice Defendant's Case and Circumvent the Court's Rulings*

The District Court entered a number of pretrial orders designed to preclude the plaintiffs from placing irrelevant and prejudicial categories of evidence before the jury. On October 19, 1982, the District Court entered an order barring references to thalidomide and MER/29, drugs

* "JA" citations are to the Joint Appendix in the Court of Appeals, a copy of which will be lodged with this Court.

which are unrelated to Bendectin and have not been marketed for over 20 years (JA111). On January 17, 1983, the District Court entered an order precluding evidence relating to Marco Cordova and Pauline Sand, "children whose only demonstrable relationship to Anne Koller is that they have suffered birth defects that are superficially similar to those of Anne Koller" (JA133-JA134). On January 31, 1983, the District Court held that plaintiffs' use of Drug Experience Reports ("DERs") submitted to the Food and Drug Administration ("FDA") would be limited to no more than five DERs, chosen from those submitted within one year after the birth of the children involved (JA157-JA166).*

Beginning on January 28, 1983, Butler took steps which resulted in the circumvention of all three of these orders of the District Court. At this time, the final pretrial of the action was scheduled to begin on January 31, 1983, to be followed immediately by trial (JA593, JA595). Butler prepared simulated DERs concerning 14 limbless children, including Marco Cordova and Pauline Sand, all of whom were more than one year old (JA2850-JA3107). All 14 children were clients of Butler's firm (JA1516). Butler added photographs showing the deformities of each of the 14 children and sent the DERs and photographs to Morton Mintz of *The Washington Post*, as well as to the Commissioner of the FDA, the Surgeon General, and the defendant (JA270-JA274, JA1513-JA1515).

* The DERs are hearsay reports of birth defects in children of mothers who took Bendectin during pregnancy. The District Court recognized that the DERs are not a random sample and are not based upon any scientific methodology (JA165-JA166). In order to limit collateral issues, the Court restricted plaintiffs to a total of no more than five DERs (JA166). Because the danger of self-serving DERs increases with the time elapsed between birth and the filing of the DERs, the District Court precluded the use of DERs filed more than one year after birth (JA164).

Butler followed up this release by giving an interview to Morton Mintz of *The Washington Post* on February 1, 1983 (JA272-JA273). Predictably, Butler's efforts resulted in a six-column article on the third page of *The Washington Post* for February 7, 1983 (JA1516). The article highlighted Butler's charge that the 14 limbless children were victims of Bendectin, characterizing the 14 cases as a "new chapter" in a "controversy" concerning Bendectin (*ibid.*). It described in detail the deformities of Anne Koller and several other children (*ibid.*). The article referred specifically to the forthcoming trial of this case, stating that the trial "may begin this week in U.S. District Court here" (*ibid.*). It reported Butler's involvement with a prior thalidomide case against the defendant, and quoted Butler as saying that most of the 14 Bendectin cases had been referred to him by lawyers who knew of his prior thalidomide case (*ibid.*).

By using *The Washington Post* in this manner, Butler was able to place before prospective jurors all three of the irrelevant and prejudicial categories of evidence which the District Court had ruled inadmissible: (1) thalidomide; (2) Marco Cordova, Pauline Sand, and other "children whose only demonstrable relationship to Anne Koller is that they have suffered birth defects that are superficially similar to those of Anne Koller" (JA133-JA134); and (3) self-serving DERs prepared by counsel long after the one-year cutoff adopted by the District Court.

There was no release of the material given to *The Washington Post* to any other newspaper or correspondent (*see* JA272-JA273). This fact gave rise to a powerful inference

that Butler's purpose in sending the material to *The Washington Post* was to disseminate it to prospective jurors in this case, thereby circumventing the evidentiary rulings of the District Court. The District Court twice invited Butler to give his explanation of the timing and narrow scope of his release (JA618, JA1062-JA1062-1), but Butler declined to testify. On February 17, 1983, ten days after the publication, Butler's counsel admitted to the District Court that he could not explain the timing of Butler's release (JA615-27). On May 24, 1983, three and one half months after the publication, Butler filed an affidavit in which he attributed the timing to the need to obtain permission for the release from the families of the 14 children (JA273), an explanation which was undercut by the fact that all 14 families were clients of Butler's law firm who had been referred "[o]ver the last two years" (JA1516).

Moreover, it developed that this was not the first instance in which Butler had used the press to communicate inadmissible evidence to the jury. There was undisputed evidence that Butler had used the press to place inadmissible evidence before the jury in a previous drug product liability case in 1975, near the end of two and one half months of trial. *Johnson* v. *SmithKline Corp.*, Ariz. Super. Ct., Maricopa County, Cause No. 266659 (JA430-JA435).

On the basis of all of the facts before it, the District Court found that "Butler's knowing release to the Post of information previously ruled inadmissible by this Court was a flagrant circumvention of the orders of this Court" (77a). The District Court further found that Butler's refusal to testify as to his motives supported its "conclusion that his release of the DERs to the media was calculated to prejudice the defendant's case and circumvent the Court's prior rulings" (78a).

2. *Allis: Attempt to Thwart a True Investigation of a Crucial Witness in This Case*

Nicholas R. Allis is Butler's partner in the law firm of Butler, Jefferson, Dan & Allis of Los Angeles, California. The District Court's finding of misconduct by Allis arose from the following sequence of events.

On Wednesday, December 22, 1982, Krystyna Janowski, Allis's secretary, telephoned the offices of one of defendant's counsel and left two telephone messages stating, among other things, that this case was fraudulent and that Mrs. Koller was lying as to the time when she took Bendectin (JA334, JA336, JA4530-JA4542). Defense counsel attempted to arrange for a conference with the District Court, but were told by the District Court's law clerk that the Court was in recess until the following Monday, December 27, 1982 (JA596-44-JA596-46, JA1461). Defendant's counsel obtained independent counsel to represent and advise Ms. Janowski (JA564, JA1461). By a letter delivered by hand on Monday, December 27, 1982, defense counsel advised the District Court of these developments (JA1461-JA1462).

Meanwhile, Ms. Janowski had second thoughts about the damage that might result to the Butler firm (JA4555-JA4556). On Sunday night, December 26, 1982, she contacted the Butler firm and told it that she had been induced and pressured to contact defense counsel (JA4556-JA 4559).* The Butler firm lost no time in reacting. On Monday evening, December 27, 1982, Allis obtained Ms. Janowski's signature under oath on a statement which

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* In subsequent testimony under oath, Ms. Janowski and defendant's representatives who dealt with her all denied any pressure or inducement (JA1065, JA1102-JA1103, JA1378-JA1382, JA1388-JA1389, JA4542).

Allis himself had drafted, retracting her disclosures to defense counsel (JA1504). The text of the statement is set forth in the opinion of the Court of Appeals (9a-10a). The next day, Tuesday, December 28, 1982, Butler transmitted this statement to the District Court (JA1501-JA1505).

On January 3, 1983, Ms. Janowski's counsel wrote to the District Court, stating that Ms. Janowski disavowed the statement and averring that the statement was obtained under duress and on an offer by the Butler firm to continue payment of Ms. Janowski's full salary and fringe benefits, including hospitalization benefits for her premature baby (JA1511-JA1512). Beginning on January 12, 1983, Ms. Janowski's deposition was taken in Los Angeles. She testified that Mrs. Koller had admitted to her that she did not take Bendectin as early as she had testified (JA4444-JA4447, JA4465-JA4468). Ms. Janowski further testified that Allis told her on December 27, 1982 that she could undo the damage she had done if she would sign a statement retracting what she had said (JA4575-JA4576, JA4698-JA4699). She stated that Allis agreed that she would be continued as an employee of the Butler firm without working in the office (JA1119, JA4584-JA4585). Ms. Janowski also testified that Allis told her that if she did not cooperate, the Butler firm would destroy her with her own past (JA1130-JA1131).*

After reading the transcript of Ms. Janowski's deposition, the District Court authorized depositions of representatives of both plaintiffs and defendant on the issues raised in connection with the Janowski deposition (JA574-JA593, JA 600-1, JA625-JA628). After reviewing the depositions, the District Court ruled that an evidentiary hearing should be held with respect to the statement prepared by Allis (JA630-JA631). The District Court made clear that it was concerned in this hearing, not with whether or not Ms. Janowski talked to Mrs. Koller, but with the conduct of Allis and the Butler firm in preparing the statement signed by Ms. Janowski and presenting it to the Court (*see* JA623-JA624, JA644-JA646).

* Ms. Janowski was in fact subjected at her deposition to brutal and prolonged cross-examination concerning aspects of her past life. This cross-examination did not succeed in shaking the testimony which Ms. Janowski gave on direct examination (*see* JA1117-JA1132, JA1522-JA1531).

At the evidentiary hearing, plaintiffs presented no testimony, but defendant called Allis and other witnesses identified with the plaintiffs. After the evidentiary hearing, the District Court issued an order to show cause why Allis should not be disqualified (JA207-JA208). In response to the order to show cause, Allis testified again, together with character witnesses and two expert witnesses on legal ethics.

Butler and Allis claimed that they did not learn until Tuesday, December 28, 1982 that Ms. Janowski had told defense counsel that the case was fraudulent, so that the statement obtained by Allis on December 27, 1982 was not designed as a retraction, but merely represented an effort to ascertain the facts on behalf of their clients (JA3920-JA3921, JA3947, JA3988, JA4090, JA4093, JA4360). This testimony of Butler and Allis was contradicted, however, by their client, Mrs. Koller, their co-counsel, Allen T. Eaton, and their investigator, Floyd T. Humphries, Jr., all of whom testified that Butler or Allis had told them on December 27, 1982, before the statement was obtained, that Ms. Janowski had told defense counsel that the case was fraudulent (JA3583-JA3584, JA3764, JA3783-JA 3784). The District Court resolved this conflict in testimony adversely to the claim of Butler and Allis, finding that

> "the credible and probative evidence in the record reveals that the primary, if not the only reason, Allis and Humphries visited Janowski on December 27, 1983, was to obtain a retraction." (76a.)

On the basis of all the testimony it had heard, the District Court further found that Allis's conduct in procuring the retraction and presenting it to the Court without explanation was improper (76a). Indeed, the uncontradicted evidence before the Court made clear that the statement as presented to the Court was seriously misleading. For example, the statement recited that Ms. Janowski had been promised no remuneration for the statement "or for anything else" (JA1504), but in fact Allis agreed that she could continue to receive her salary without coming into the office and proposed having a typewriter sent to her apartment (JA712, JA849-JA851, JA3808, JA3827-JA3828). Again, the statement twice recited that Ms. Janowski's mind was "free and clear" (JA1504), whereas in fact Butler believed that Ms. Janowski had "flipped" or was "crazy" (JA3856), while Allis believed that she was "a little bit emotionally unstable" (JA684), "hostile" (JA813), and "an emotionally somewhat unbalanced woman" (JA3671).

The District Court further found that Allis's purpose in obtaining the statement and submitting it to the Court was not "to ascertain the truth" but rather "to thwart a true investigation of a crucial witness in this case in pursuit of protecting the interests of his clients" (77a). The District Court concluded that this finding was supported by a number of factors, including

> "1) Allis' collaboration with Humphries to surreptitiously record a portion of his conversation with Janowski; 2) Allis' testimony under oath that he had no intention of informing the Court of the findings of his 'investigation'; 3) Allis' failure to read the prepared statement line-by-line to Janowski to ensure that she understood the contents of the statement before signing; and 4) Allis' procurement of the statement irrespective of the erratic behavior displayed by Janowski during his visit on December 27." (76a-77a.)

On the basis of "the totality of the evidence," the District Court therefore rejected the opinions of the experts on legal ethics called by the plaintiffs, and held that Allis's conduct was improper (76a).

3. *The Appropriateness of Disqualification*

Having found that both Butler and Allis were guilty of misconduct, the District Court proceeded to consider the appropriate remedy.

The District Court specifically found that if the Butler firm was disqualified, "remaining counsel can provide plaintiffs with competent counsel" (78a). It observed that plaintiffs' other counsel included the attorneys that represented the plaintiffs in the first Bendectin case to reach trial (*ibid.*). *See Mekdeci* v. *Merrell National Laboratories,* 711 F.2d 1510, 1516-25 (11th Cir. 1983). For these reasons, the District Court found that "[p]laintiffs' case would not be jeopardized by the disqualification of the Butler firm" (*ibid.*).

The District Court also considered the effects of disqualification upon the Butler firm (75a, 78a). It concluded that these effects "do not outweigh the strong public interest in maintaining the integrity of the judicial process" (78a).

B. The Facts as Refound by the Court of Appeals

On appeal, the Court of Appeals (Circuit Judges Wald and Mikva, with District Judge Richey concurring in a

separate opinion) discarded or ignored the findings of fact made by the District Court, and substituted new and different findings of its own.

1. *Butler: "Some Question" as to Bad Intent*

With regard to Butler, the Court of Appeals stated that it had "some question" about the District Court's finding that Butler acted with intent to prejudice the defendant and to circumvent the District Court's evidentiary rulings (51a). The Court of Appeals termed "plausible" Butler's belated explanation that he had to wait until January 1983 for the parents' authorization to release the DERs (*ibid.*). It concluded that the support for the District Court's finding of bad intent was not "unambiguous" (*ibid.*). However, the Court of Appeals nowhere stated that the District Court's finding as to Butler's intent was erroneous, let alone clearly erroneous.

The Court of Appeals complained that the District Court had made no finding as to the impact of Butler's actions on the likelihood of a fair trial (55a). Instead of remanding for a finding on this issue, the Court of Appeals made a finding itself:

> "We have no basis for believing that voir dire, a process designed in part to protect against prejudicial publicity, would be inadequate to discover and remove any jurors influenced by the Mintz article." (*Ibid.*; footnote omitted.)

Defendant's petition for rehearing pointed out that there should be a remand if this issue was deemed critical (pp. 7-8), but the Court of Appeals declined to remand the matter.

In its initial opinion, the Court of Appeals held that Butler did not violate Canon 20 of the District of Columbia

Code of Professional Responsibility (53a-56a). On July 16, 1984, the Court of Appeals amended its opinion to delete this holding, and replaced it with a statement that it had not determined whether or not Butler's conduct violated Canon 20 (70a-71a). By way of conclusion, the Court of Appeals stated that "[w]hile Butler's decision to release the DERs to the press precisely when he did is not to be applauded," it could not furnish a basis for disqualification (56a).

2. *Allis: "On the Whole," No Misconduct*

The District Court's central finding as to Allis was that he attempted "to thwart a true investigation of a crucial witness in this case in pursuit of protecting the interests of his clients" (77a). Again, the Court of Appeals questioned this finding, but did not reverse it. The Court of Appeals acknowledged that "[t]here is authority for the proposition that surreptitiously recording generally is unethical," and it stated that "this court does not sanction the practice" (47a). However, the Court of Appeals said, under the circumstances of this case, "Allis' actions in taping his conversation with Janowski can more easily be understood to reflect a desire to get at the truth and to protect the interest of his client rather than to 'thwart a true investigation' " (*ibid.*).

The Court of Appeals similarly reviewed the other factors relied upon by the District Court, and indicated that it did not view them as the District Court had (43a-47a). The Court of Appeals concluded that "[o]n the whole, we conclude that Allis' actions throughout the Janowski episode did not constitute misconduct and do not justify his disqualification from further representation of plaintiffs" (47a-48a; footnote omitted).

C. The Decision of the Court of Appeals

The Court of Appeals did not find any of the District Court's findings of fact to be clearly erroneous, although (as noted above) it freely engaged in *de novo* factfinding on appeal. Nor did it find that the District Court had abused its discretion. Instead, the Court of Appeals held that, as a matter of law, Butler and Allis could not be disqualified on the basis of their actions in this case:

> "We conclude that the district court applied an erroneous legal standard in evaluating whether Allis and Butler had engaged in misconduct warranting revocation of their *pro hac vice* appearances. Viewed under the appropriate standards, the conduct of neither Butler nor Allis justifies the court's order revoking their appearances and disqualifying their law firm. . . ." (56a).

Citing *Board of Education* v. *Nyquist*, 590 F.2d 1241 (2d Cir. 1979), the Court of Appeals held that disqualification should "rarely" be granted for misconduct not involving a past or present conflict of interest (37a-38a). The Court of Appeals said that "[e]xcept in cases of truly egregious misconduct likely to infect future proceedings, other means less prejudicial to the client's interest than disqualifying the counsel of her choice are ordinarily available to deal with ethical improprieties by counsel" (38a). As examples of such other means, the Court mentioned reprimands, contempt citations, and referrals to bar disciplinary bodies (38a n.49).

Reasons for Granting the Writ

1. The Decision Below Wrongly Abolishes as a Matter of Law the Established Authority of the District Courts to Disqualify Counsel for Misconduct

Until the decision of the Court of Appeals in this case, it was established law in each of the Circuits that the District Courts have the authority and the responsibility to supervise the conduct of the attorneys appearing in cases before them.* It was further established that pursuant to this supervisory authority, the District Courts have the power to disqualify counsel who have been guilty of misconduct in cases pending before them from further participation in those cases.**

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* *See, e.g., Groper* v. *Taff*, 717 F.2d 1415, 1418 (D.C. Cir. 1983); *Kevlik* v. *Goldstein*, 724 F.2d 844, 847 (1st Cir. 1984); *Dunton* v. *County of Suffolk*, 729 F.2d 903, 909 (2d Cir. 1984); *Hull* v. *Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975); *Kreda* v. *Rush*, 550 F.2d 888, 889 (3d Cir. 1977); *Richardson* v. *Hamilton International Corp.*, 469 F.2d 1382, 1385 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *In re Asbestos Cases*, 514 F. Supp. 914, 919-20 (E.D. Va. 1981), *aff'd without opinion by an equally divided court sub nom. Greitzer & Locks* v. *Johns-Manville Corp.*, 710 F.2d 127 (4th Cir.), *cert. denied*, 459 U.S. 1010 (1982); *Musicus* v. *Westinghouse Electric Corp.*, 621 F.2d 742, 744 (5th Cir. 1980); *Woods* v. *Covington County Bank*, 537 F.2d 804, 810 (5th Cir. 1976); *City of Cleveland* v. *Cleveland Electric Illuminating Co.*, 440 F. Supp. 193, 195-96 (N.D. Ohio 1976), *aff'd without opinion*, 573 F.2d 1310 (6th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978); *Schloetter* v. *Railoc of Indiana, Inc.*, 546 F.2d 706, 710 (7th Cir. 1976); *Gilbert* v. *City of Little Rock*, 622 F.2d 386-87 (8th Cir. 1980); *Trone* v. *Smith*, 621 F.2d 994, 999 (9th Cir. 1980); *Redd* v. *Shell Oil Co.*, 518 F.2d 311, 314 (10th Cir. 1975); *Kesselhaut* v. *United States*, 555 F.2d 791, 794 (Ct. Cl. 1977).

** *See, e.g., United States* v. *Snyder*, 707 F.2d 139, 145 (5th Cir. 1983); *United States* v. *Hobson*, 672 F.2d 825, 828 (11th Cir.), *cert. denied*, 459 U.S. 906 (1982); *United States* v. *Dinitz*, 538 F.2d 1214, 1219-23 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); *Laughlin* v. *Eicher*, 145 F.2d 700, 702 (D.C. Cir. 1944), *cert. denied*, 325 U.S. 866 (1945); *Viereck* v. *United States*, 130

The decision of the court below, by holding that disqualification is barred in this case as a matter of law, would deprive the District Courts of a remedy which has long been recognized as a vital part of the means available to them to deal with misconduct by counsel.* Such a curtailment of the remedies available to the District Courts would be especially unfortunate in view of the key role that they play in insuring the fairness and effectiveness of the administration of justice in the Federal courts. *See, e.g., Roadway Express, Inc.* v. *Piper,* 447 U.S. 752, 764-67 (1980); *Geders* v. *United States,* 425 U.S. 80, 86-87 (1976).

The court below suggested that alternative means such as reprimands, contempt citations, and bar disciplinary proceedings will suffice to deal with misconduct by counsel (38a & n.49). This suggestion ignores the lessons of history. In particular, it ignores the many serious practical difficulties standing in the way of effective professional discipline. *See, e.g.,* ABA Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (1970). The alternative remedies suggested by the court below did not deter either Butler or Allis in this case. If the decision below is allowed to stand, its proposed alternatives will be read as make-weights. It will have destroyed the most effective remedy.

F.2d 945, 961-62 (D.C. Cir. 1942), *rev'd on other grounds,* 318 U.S. 236 (1943); *United States* v. *Madsen,* 148 F. Supp. 625, 627-28, 632-33 (D. Alaska 1957).

* Apparently unwilling to admit that it was foreclosing altogether the possibility of disqualification for misconduct, the court below indicated that disqualification might possibly be granted for misconduct, albeit "rarely" and "in cases of truly egregious misconduct" (38a). However, the Court of Appeals did not describe any set of facts on which it would sustain disqualification for misconduct, and it made clear that disqualification would not be sustained here even if misconduct were found (*see, e.g.,* 50a-56a).

The court below cited *Board of Education* v. *Nyquist,* 590 F.2d 1241 (2d Cir. 1979), for the proposition that disqualification should be limited essentially to past and present conflicts of interest (37a-38a). The *Nyquist* case, however, held only that disqualification should not be granted on the basis of an appearance of impropriety arising from a conflict unless there is an actual past or present conflict. Neither *Nyquist* nor any other case known to us held that where there has been actual misconduct, disqualification may not be granted in the absence of a past or present conflict of interest. To the best of our knowledge, the decision below is the first to so hold. It should be reversed by this Court.

2. The Court Below Brushed Aside the Clearly Erroneous Rule and the Abuse of Discretion Standard of Review

The Court of Appeals in this case totally ignored the restraints which should be observed by an appellate court. Without paying any heed to the clearly erroneous rule, the Court of Appeals freely made factual findings different from those made by the District Court. Without concerning itself with the abuse of discretion standard of review, the Court of Appeals imposed its own conception of the proper outcome in this case. If such actions by the Courts of Appeals are to be permitted, the supervisory authority of the District Courts over attorneys practicing before them will be gravely reduced.

a. *The Clearly Erroneous Rule*

Rule 52(a) of the Federal Rules of Civil Procedure mandates that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of

the witnesses." This Court has repeatedly stressed the fundamental importance of this limitation upon the scope of appellate review of facts. *See, e.g., Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1982); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 285-90 (1982); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394-96 (1948). The Court has consistently emphasized that where an appellate court deems further findings of fact to be necessary, it should remand to the trial court for such findings rather than making them itself. *See, e.g., Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-92 (1982); *Kelley* v. *Southern Pacific Co.*, 419 U.S. 318, 331-32 (1974). In addition, the Court has held that "[f]indings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them." *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949).

The Court of Appeals in this case flouted all of these precepts. Without holding any of the District Court's findings to be clearly erroneous, it indicated that it deemed other findings to be "plausible" or "more easily . . . understood" (*see* pp. 12, 13 *supra*). Instead of remanding, the Court of Appeals made its own findings in areas not covered by the District Court's findings (*see* pp. 12-13 *supra*). It disregarded the District Court's findings as to the intent of Butler and Allis, despite the fact that the District Court had the opportunity to appraise the demeanor of Butler, Allis, and their colleagues during extensive testimony (*see* pp. 12, 13 *supra*). In short, the Court of Appeals knew what result it wished to reach in this case, and rewrote the facts to match. If this is permitted, the clearly erroneous rule is a dead letter.

b. *The Abuse of Discretion Standard*

Until recent years, it was generally accepted that because the District Courts have the primary responsibility for supervising the attorneys practicing before them (*see* p. 15 *supra*), the standard of review on appeal of orders disqualifying attorneys should be abuse of discretion.* This is still the rule in a number of Circuits.** Other Circuits, however, have begun to hold in recent years that the standard of review of attorney disqualification orders should be the clearly erroneous rule as to findings of fact, together with review for legal error as to issues of law.*** There presently exists a clear conflict between the Circuits on this issue, which has been noted by various Courts of Appeals.****

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* *See, e.g., Hull* v. *Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975); *Richardson* v. *Hamilton International Corp.*, 469 F.2d 1382, 1386 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *United States* v. *Clarkson*, 567 F.2d 270, 272 n.2 (4th Cir. 1977); *In re Gopman*, 531 F.2d 262, 266 (5th Cir. 1976); *Schloetter* v. *Railoc of Indiana, Inc.*, 546 F.2d 706, 710 (7th Cir. 1976).

** *See, e.g., Kevlik* v. *Goldstein*, 724 F.2d 844, 847 (1st Cir. 1984); *NCK Organization Ltd.* v. *Bregman*, 542 F.2d 128, 131 (2d Cir. 1976); *Gilbert* v. *City of Little Rock*, 622 F.2d 386 (8th Cir. 1980); *Paul E. Iacono Structural Engineer, Inc.* v. *Humphrey*, 722 F.2d 435, 438 (9th Cir.), *cert. denied*, 104 S. Ct. 162 (1983); *Redd* v. *Shell Oil Co.*, 518 F.2d 311, 314 (10th Cir. 1975).

*** *See, e.g., United States* v. *Miller*, 624 F.2d 1198, 1201 (3d Cir. 1980); *Richmond Hilton Associates* v. *City of Richmond*, 690 F.2d 1086, 1088 (4th Cir. 1982); *United States* v. *Snyder*, 707 F.2d 139, 143-44 (5th Cir. 1983); *General Mill Supply Co.* v. *SCA Services, Inc.*, 697 F.2d 704, 711 (6th Cir. 1982); *Novo Terapeutisk Laboratorium A/S* v. *Baxter Travenol Laboratories, Inc.*, 607 F.2d 186, 188-89 (7th Cir. 1979); *Norton* v. *Tallahassee Memorial Hospital*, 700 F.2d 617, 618-20 (11th Cir. 1983) (en banc).

**** *See, e.g., Kevlik* v. *Goldstein*, 724 F.2d 844, 847 (1st Cir. 1984); *Novo Terapeutisk Laboratorium A/S* v. *Baxter Travenol Laboratories, Inc.*, 607 F.2d 186, 188 (7th Cir. 1979).

In the present case the District of Columbia Circuit, which had previously applied a standard of abuse of discretion,* ranged itself with the Circuits that have adopted a more far-reaching mode of review, announcing that it would review for legal error (33a-34a & n.44). It then refound the facts in total violation of the clearly erroneous rule (*see* pp. 17-18 *supra*), and finally announced that on the basis of the facts it had found, it would be legal error to disqualify Butler and Allis (56a).

In its relentless drive for reversal, the Court of Appeals ignored the District Court's careful weighing of the factors bearing upon its exercise of discretion (*see* p. 11 *supra*). In particular, the Court of Appeals utterly ignored the express finding of the District Court that plaintiffs' six remaining counsel of record were fully competent to represent them in the case (*see* p. 11 *supra*).

The procedure followed by the Court of Appeals in this case, if allowed to stand, would jeopardize the supervisory authority of the District Courts over the attorneys practicing before them. The opinion of the court below is a clear warning to the District Court that any attempt to invoke the remedy of disqualification against attorney misconduct will be met on appeal by an unbendingly hostile reception, in which the presumption will be against the action taken by the District Court, rather than in favor of it.

This Court should reverse the decision of the Court of Appeals in order to make clear that the supervisory role of the District Courts cannot be so lightly brushed aside. This Court was presented with an analogous situation in *National Hockey League* v. *Metropolitan Hockey Club, Inc.*,

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* *See Groper* v. *Taft*, 717 F.2d 1415, 1418 (D.C. Cir. 1983).

427 U.S. 639 (1976), in which the Court of Appeals had reversed the District Court's dismissal of an action for willful failure to provide discovery. This Court granted certiorari and reversed per curiam, holding that the Court of Appeals had erred by failing to apply the abuse of discretion standard of review.

3. The Court Below Wrongly Held That an Attorney May Not Be Disqualified for Releasing Material Which Has Been Ruled Inadmissible With Intent to Circumvent the Ruling and to Prejudice an Opponent

The District Court found, on the basis of ample evidence, that Butler deliberately released irrelevant and prejudicial materials which had been ruled inadmissible by the Court, in order to circumvent the Court's rulings and prejudice the defendant (*see* pp. 3-6 *supra*). The Court of Appeals raised a "question" as to this finding, but did not (and could not) hold it to be clearly erroneous (*see* p. 12 *supra*).

Such a deliberate attempt to prejudice prospective jurors with inadmissible evidence violates the provisions of the District of Columbia Code of Professional Responsibility, including Canon 20 and Disciplinary Rule 7-108(A) (95a-96a). In its original opinion, the Court of Appeals expressed the view that there had been no violation of these provisions (*see* pp. 12-13 *supra*). On July 16, 1984, however, the court below amended its opinion to state that it had not determined whether or not Canon 20 was violated (*see* p. 13 *supra*). Thus the finding of the District Court that Butler was guilty of misconduct stands unreversed by the Court of Appeals.

The eventual holding of the Court of Appeals as to Butler was that, even if Butler had committed a deliberate violation of the Code of Professional Responsibility,

he could not be disqualified in the absence of a finding that his actions had made a fair trial impossible (*see* p. 12 *supra*). Even assuming *arguendo* that this legal standard was correct, the question whether it was met was for the informed determination of the District Court, not for the Court of Appeals. *Cf., e.g. Patton* v. *Yount,* 52 U.S.L.W. 4896, 4900 (U.S. June 26, 1984). By reaching out to make a finding on this issue itself, rather than remanding to the District Court, the Court of Appeals violated the repeated admonitions of this Court (*see* pp. 17-18 *supra*).

Moreover, the factual finding of the Court of Appeals that the materials disseminated by Butler would not irretrievably prejudice the defendant was clearly erroneous. These materials reached the prospective jurors at the time of the greatest danger of prejudicial impact, after they had been called for service and before they had come under the protection of the trial court's supervision and instructions. *Cf., e.g., Marshall* v. *United States,* 360 U.S. 310, 313 (1959). Voir dire might disclose which potential jurors had read the article inspired by Butler in *The Washington Post,* but it would confront defendant with the dilemma of accepting a tainted jury or a jury of nonreaders in a case dependent upon scientific evidence.

In any event, the Court of Appeals was wrong in holding that the District Court's power to disqualify Butler should depend upon a showing that specific prospective jurors have been tainted. The limitations of the means available to the courts to detect a prejudicial impact upon the jury panel are serious and well recognized. *See, e.g., Irvin* v. *Dowd,* 366 U.S. 717, 728 (1961); *Krulewitch* v. *United States,* 336 U.S. 440, 453 (1949) (Jackson, *J.*, concurring). By deliberately using the press to prejudice the jury venire, as found by the District Court (*see* pp. 3-6 *supra*), Butler

manifested his belief that he would succeed in tainting the jury, as well as his intention to do so. He should not be permitted to escape the consequences of his acts on the ground that the results he expected and intended were not proved to the satisfaction of the Court of Appeals.

Such a deliberate attempt to prejudice potential jurors was held to justify disqualification in *State* v. *Kavanaugh,* 52 N.J. 7, 243 A.2d 225, *cert. denied,* 393 U.S. 924 (1968), a case which involved the well-known criminal defense counsel F. Lee Bailey. After failing to persuade the trial court to permit the introduction into evidence of the results of polygraph tests of the defendants, Bailey sent a letter to the Governor of New Jersey and over 150 other persons, attacking the conduct of the case and revealing the results of the polygraph tests. The New Jersey Supreme Court, in a decision of which this Court denied review, held that Bailey should be disqualified, stating:

> "It is not easy for us to oust counsel of a client's choice. But the misbehavior here is so gross that we cannot risk more of it. We have searched for some evidence that Mr. Bailey would stay in bounds, but unhappily we cannot find it. There must be a fair trial, both for a defendant and for the State. The conduct here involved invaded that interest. But of even greater moment than the interest of the immediate parties is the interest of the public in the integrity of the judicial process. The antics here involved spill over upon the right of all litigants to expect justice in the courtroom and in accordance with the rules of law. We have weighed again and again whether that larger interest could be served by a subsequent disciplinary proceeding alone, and we are constrained to find that it would not. We must therefore affirm the order." 52 N.J. at 18, 243 A.2d at 231.

In the present case, as in *State* v. *Kavanaugh*, there is no basis for a finding that Butler would refrain from further misconduct in this case. Butler has a demonstrated propensity for using the press to disseminate inadmissible and prejudicial evidence (*see* p. 6 *supra*). He has shown no contrition for his misconduct in this case, insisting instead that he had a constitutional right to act as he did. The District Court was not required to take the risk that Butler would decide to abort the trial of this case by releasing further prejudicial data after two and a half months of trial (*see* p. 6 *supra*). It properly exercised its discretion to disqualify Butler to prevent such future misconduct.

Respondents and various *amici* contended before the Court of Appeals that disqualification of Butler in this case would contravene the First Amendment. This contention was not adopted by the Court of Appeals, but nonetheless calls for brief response. This Court has made it overwhelmingly clear that the First Amendment does not protect a lawyer such as Butler who deliberately circumvents the evidentiary rulings of the District Court. For example, in *Sheppard* v. *Maxwell*, 384 U.S. 333, 363 (1966), the Court stated:

> "Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."

See also, e.g., Landmark Communications, Inc. v. *Virginia*, 435 U.S. 829, 837 (1978); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 564 & n.8 (1976); *id.* at 601 n.27 (Brennan, *J.*, concurring).

Thus the First Amendment clearly permits the courts to prevent the dissemination of inadmissible and prejudicial evidence. If not reversed, however, the decision below will destroy the most effective means available to the courts for preventing such abuses.

4. Attorney Disqualification Orders in Civil Cases Are Not Subject to Interlocutory Appeal Under *Flanagan* v. *United States*, 104 S. Ct. 1051 (1984)

In *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 373-78 (1981), the Court held that an order denying a motion to disqualify counsel in a civil case was not appealable under the doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). The Court expressed no view as to the appealability of an order granting a motion to disqualify counsel, or of an order denying such a motion in a criminal case. 449 U.S. at 372 n.8.

During the three-year period that elapsed between the Court's decision in *Firestone Tire & Rubber Co.* v. *Risjord* and its recent decision in *Flanagan* v. *United States*, 104 S. Ct. 1051 (1984), all of the Courts of Appeals that passed upon the question held that orders disqualifying counsel in civil cases were appealable under the *Cohen* doctrine.* Similarly, with only one exception, all of the Courts of Appeals that passed upon the issue held that disqualification orders in criminal cases were likewise appealable under the *Cohen* doctrine.**

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* *See, e.g., Groper* v. *Taff*, 717 F.2d 1415, 1417 (D.C. Cir. 1983); *Glueck* v. *Jonathan Logan, Inc.*, 653 F.2d 746, 748 n.2 (2d Cir. 1981); *Greitzer & Locks* v. *Johns-Manville Corp.*, 710 F.2d 127 (4th Cir.), *cert. denied*, 459 U.S. 1010 (1982); *Duncan* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020, 1024-27 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981); *General Mill Supply Co.* v. *SCA Services, Inc.*, 697 F.2d 704, 706 (6th Cir. 1982); *Freeman* v. *Chicago Musical Instrument Co.*, 689 F.2d 715, 717-21 (7th Cir. 1982); *Gough* v. *Perkowski*, 694 F.2d 1140, 1141-45 (9th Cir. 1982); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 658 F.2d 1355, 1356-58 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982); *Norton* v. *Tallahassee Memorial Hospital*, 689 F.2d 938, 941 (11th Cir. 1982), *rehearing denied*, 700 F.2d 617 (11th Cir. 1983) (en banc).

** *See Flanagan* v. *United States*, 104 S. Ct. 1051, 1053-54 n.2 (1984), and cases cited.

In *Flanagan* v. *United States*, 104 S. Ct. 1051 (1984), this Court unanimously held that orders disqualifying counsel in criminal cases are not appealable under the *Cohen* doctrine. The *Flanagan* decision naturally raises the question whether orders disqualifying counsel in civil cases are appealable. We are aware of two decisions which have dealt with this question since *Flanagan*: the decision of the court below, and the decision of the Second Circuit in *Interco Systems, Inc.* v. *Omni Corporate Services, Inc.*, 733 F.2d 253 (2d Cir. 1984). The court below held that the holding of this Court in *Flanagan* has no application to civil cases (23a-33a). The Second Circuit in the *Interco* case acknowledged that "the language of the *Flanagan* opinion might be regarded as a call to reexamine this circuit's established rule permitting interlocutory appeals of disqualification orders in civil cases," but decided to adhere to its prior decisions "until the issue is otherwise specifically determined by the Supreme Court." 733 F.2d at 254-55.

The reasoning of this Court in *Flanagan* applies to civil cases just as it does to criminal cases. The Court based its analysis of the *Cohen* criteria in *Flanagan* upon two alternative assumptions: (1) that if the disqualification order was eventually held to be erroneous on an appeal from a final judgment, the judgment would automatically be reversed without any need for a showing of prejudice; and (2) that a showing of prejudice would be required.* On the first assumption, the Court held, a disqualification order "does not meet the third condition for coverage by the collateral order exception: it is not 'effectively unreviewable on appeal from a final judgment.'" 104 S. Ct. at 1056. On the second

* The Court held that for purposes of its decision on appealability, it did not need to resolve whether or not a showing of prejudice is required. 104 S. Ct. at 1056 n.4.

assumption, the Court held, the second *Cohen* criterion would not be satisfied, because the issue of disqualification would not be completely separate from the merits of the case:

> "On this assumption, a disqualification order, though final, is not independent of the issues to be tried. Its validity cannot be adequately reviewed until trial is complete. The effect of the disqualification on the defense, and hence whether the asserted right has been violated, cannot be fairly assessed until the substance of the prosecution's and defendant's cases is known. . . ." 104 S. Ct. at 1057.

The same reasoning also applies to disqualification orders in civil cases. If such orders are viewed as subject to reversal without any showing of prejudice—an approach which has no support in precedent and which was rejected by the court below (28a-29a)—then, as in the first alternative considered by the Court in *Flanagan*, such orders would fail to meet the third *Cohen* criterion of effective unreviewability on appeal from a final judgment. On the other hand, if disqualification orders in civil cases are subject to reversal only on a showing of prejudice. then, as in the second alternative considered by this Court in *Flanagan*, the issue of prejudice cannot be divorced from a consideration of the entire record after the entry of final judgment.

The court below declined to apply the reasoning of *Flanagan* to civil cases, essentially on the ground that it would be impossible to show prejudice from a disqualification order at the end of the case (28a-32a).* The same

* The Court of Appeals also suggested that counsel should have a right to appeal a disqualification, and not only their clients (32a-33a). Even if it were sound, this suggestion would go only to the issue of standing to take an appeal, not to the issue of the time when the appeal should be taken.

argument, however, could also be made in criminal cases, and there is no support for the further suggestion of the court below (31a-32a) that the right to counsel in a civil case is more absolute than the Sixth Amendment right to counsel in a criminal case.

The present appeal dramatically illustrates the unwisdom of permitting interlocutory appeals from disqualification orders in civil cases. This appeal has already delayed the further progress of the case for more than six months. It has drawn the Court of Appeals into an ill-informed and fragmentary prejudgment of some aspects of the case. In the absence of this appeal, the trial would have gone forward with the six counsel of record for plaintiffs who were not affected by the District Court's disqualification order. By this time, the results of the trial would be known, and any appeal of the disqualification order could have proceeded against a full record encompassing the case as a whole, and not merely pieces of it.

Conclusion

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Dated: July 24, 1984

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals
Dated May 29, 1984

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5039

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, et al.

JAMES G. BUTLER, NICHOLAS R. ALLIS and the law firm of BUTLER, JEFFERSON, DAN & ALLIS, APPELLANTS

v.

RICHARDSON-MERRELL, INC., a Delaware Corporation

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 80-1258)

Argued March 22, 1984

Decided May 29, 1984

Jacob A. Stein, with whom *Robert Muse* and *Robert M. Weinberg* were on the brief, for appellants. [2]

Lawrence E. Walsh, with whom *Guy M. Struve, Whitney L. Schmidt, Vincent H. Cohen* and *Robert B. Cave* were on the brief, for appellee, Richardson-Merrell, Inc.

Boisfeuillet Jones, Jr. and *Carol D. Melamed* were on the brief for *amicus curiae,* Washington Post Company, urging reversal.

Anthony Z. Roisman was on the brief for *amicus curiae,* Trial Lawyers for Public Justice, urging reversal.

Stephen H. Glickman and *Arthur B. Spitzer* were on the brief for *amicus curiae,* American Civil Liberties Union Fund of the National Capitol Area, urging reversal.

Barry J. Nace entered an appearance for *amicus curiae,* Association of Plaintiff's Trial Attorneys of Metropolitan Washington, D.C., urging reversal.

Before: WALD and MIKVA, *Circuit Judges,* and RICHEY, **United States District Judge* for the District of Columbia.

Opinion for the Court filed by *Circuit Judge* WALD.

Concurring opinion filed by *District Judge* RICHEY.

WALD, *Circuit Judge*: This appeal arises out of a lawsuit filed in May, 1980, in which plaintiffs Cynthia and John Koller and their daughter Anne Elizabeth Koller allege that Mrs. Koller's ingestion during the first trimester of her pregnancy of the anti-nausea drug Bendectin, which is manufactured by the defendant, caused the severe limb malformations with which her daughter was born. Shortly before trial was to begin, two separate episodes gave rise to allegations of misconduct against plaintiffs' counsel and a motion by the defendant to impose sanctions against them. Following extensive discovery and hearings, the district court in its ruling of Jan[3]uary 6, 1984, revoked the

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

pro hac vice appearances of Nicholas Allis and James Butler and disqualified their firm, Butler, Jefferson, Dan & Allis, from further representation of the plaintiffs.[1] The court held that Allis had attempted to "thwart a true investigation of a crucial witness" by obtaining a statement from his (Allis')secretary declaring that representatives of the defendant were pressuring her to sign a false statement that the Koller case was a fraud. The court also determined that Butler, in an unrelated episode, had deliberately circumvented the court's pretrial evidentiary rulings when he released to Morton Mintz, a Washington Post reporter, information that had recently been ruled inadmissible at trial on the alleged connection between Bendectin and the congenital deformities of fourteen infants. Allis, Butler, their law firm and the plaintiffs appeal from the district court's order.[2]

We must determine first whether we have jurisdiction to review this interlocutory order in light of the Supreme Court's recent decision in *Flanagan* v. *United States,* 104 S.Ct. 1051 (1984), holding that there was no jurisdiction to entertain an interlocutory appeal by defendants in a criminal case of an order disqualifying their counsel. We conclude that an order disqualifying counsel in a civil proceeding, at least in the circumstances present here, is immediately reviewable. We conclude on the merits that

[1] Koller v. Richardson-Merrell, Inc., Civil No. 80-1258 (D.D.C. Jan. 6, 1984). All orders, memorandum opinions, hearings, depositions and affidavits in this docket are hereinafter cited only by date and by page number in the Joint Appendix (J.A.). Other items of record are cited to the Joint Appendix only.

[2] Notice of Appeal was filed on January 19, 1984, by counsel for Butler, Allis and the Butler law firm. J.A. 242. The plaintiffs below are listed as parties to the appeal in Brief for Appellant at 2.

the district court erred in revoking the *pro hac vice* ap-[4] pearances of Allis and Butler and in disqualifying the Butler firm. We therefore reverse and remand with instructions to reinstate the *pro hac vice* appearances of plaintiffs' counsel.

I. Background

In May, 1980, plaintiffs filed suit in federal district court alleging that Anne Koller had been born without arms and legs because her mother, Cynthia, had taken Bendectin, an anti-nausea drug manufactured by the defendant, Richardson-Merrell,[3] during the first trimester of her pregnancy. In January, 1981, plaintiffs retained the law firm of Butler, Jefferson, Dan & Allis to represent them in the litigation. James Butler and Nicholas Allis were admitted *pro hac vice* to appear in the case.[4] Two key issues that emerged during pretrial discovery were whether Mrs. Koller had in fact taken Bendectin during the critical first three months of her pregnancy[5] and whether Bendectin was a

[3] Defendant Richardson-Merrell is now a subsidiary of the Dow Chemical Co., and is known as Merrell-Dow Pharmaceuticals, Inc. *See* Brief for Appellee at i.

[4] Butler was admitted *pro hac vice* pursuant to an appearance entered on January 26, 1981. J.A. 102. Allis was permitted to appear, apparently *pro hac vice*, *see infra* p. 32 & n.45, as a member of the Butler firm and a member of the bar of the District Court for the District of Columbia. *See* Hearing on Oct. 13, 1982, J.A. 561-62. Any subtle distinctions between their status have no significance in this case. *See infra* pp. 32-33.

[5] The plaintiffs appear to acknowledge that, even assuming Bendectin is a teratogen, Mrs. Koller must have taken the drug during the first 40 days of pregnancy—the period in which the fetus' limbs form—in order for Bendectin to have caused the particular limb malformations Anne Koller was born with. *See* Hearing of Feb. 10, 1983 (Allis), J.A. 603-04.

teratogen—*i.e.*, a substance that causes birth defects. After two-and-a-half years of pretrial discovery and preparation, the events described below brought a virtual halt to proceedings on the merits. [5]

A. *The Janowski Episode*[6]

On the evening of Sunday, December 26, 1982, Richard Daum, a paralegal with the Butler firm, notified Allis that he had just received a telephone call from Krystyna Janowski, Allis' secretary. According to Daum, Janowski had told him that she was being threatened and bribed by George Barnes, an investigator employed by defendant's law firm, Davis, Polk & Wardell, to induce her to sign a false statement to the effect that Cynthia Koller had not taken Bendectin in the first trimester of her pregnancy.[7]

The following day Allis decided, with other members of the Butler firm, to talk with Janowski. After a brief telephone conversation with Janowski, Allis went to meet her at the hospital where she was tending to her own prematurely-born infant. There she repeated in greater detail what she had said the previous evening: that the defendant, through its investigator Barnes, was pressur-

[6] Reviewing the facts of this episode is no simple matter. First, the court's "findings" are limited to what we can glean from its one-paragraph summary of the episode. For details, we are forced to sift from the record, with the guidance of counsel's briefs and oral arguments, the more or less undisputed facts. Second, the status of the testimony of Janowski herself, who in part corroborated and in part contradicted plaintiffs' witnesses, is very ambiguous. *See infra* pp. 13-14.

[7] *See* Affidavit of Richard Daum, June 5, 1983, J.A. 316-18; Hearing of Mar. 10, 1983 (Allis), J.A. 657-61.

ing her to sign what she said was a false statement that Mrs. Koller had admitted to Janowski that she had not taken Bendectin until after the first trimester of her pregnancy; that this pressure was in the form of promises to take care of her "wants and needs" and her child's medical expenses, and threats to reveal her criminal record; that in fact she had never had any such conversation with Mrs. Koller.[8] Although Janowski seems to have [6] admitted during this conversation that she had called Davis, Polk at some point, she insisted that it was only at the instigation of the defendant and denied saying anything about the *Koller* case being fraudulent.[9] Janowski indicated to Allis her willingness to sign a statement confirming these events.[10]

That evening Allis and Humphries, an investigator employed by the firm, went to Janowski's apartment with a short written statement for Janowski to review and sign. They recorded the conversation with a small concealed tape recorder. The transcripts of the tape[11] reflect that during the conversation Janowski once again repeated the story she had related to Allis earlier that defendants were trying to induce her to sign a false statement about Mrs. Koller, and she confirmed her willingness

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[8] *See* Hearing of Mar. 10, 1983 (Allis), J.A. 671-75, 684, 692-95.

[9] *See, e.g., id.*, J.A. 674-77, 692-93; Hearing of Mar. 15, 1983 (Allis), J.A. 816-17. The defendant does not dispute the essential points of Allis' testimony about his conversation with Janowski, although counsel said in oral argument that Janowski "dissembled" in making these statements to Allis.

[10] *See* Hearing of Mar. 10, 1983 (Allis), J.A. 671-73, 704.

[11] The record contains two versions of the transcript—one submitted by each party—which vary in inconsequential ways. Both parties have referred to defendant's version, appearing at J.A. 1467-1500; we do so as well.

at that time to sign a statement for Allis describing those inducements.[12] She took the statement pro[7]duced by Allis,

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[12] This is a summary of the transcript: Allis, Humphries, and Janowski discussed briefly the health of Janowski's baby, arrangements for getting her paycheck and vacation pay later that week, and Janowski's hostility toward the firm and dissatisfaction with her job and salary. J.A. 1469-76. Janowski then began to talk about feeling harassed by Barnes, who had been coming to see her at the hospital and her house—"[r]ound the clock harassment." Janowski continued, "Well some of the conversation going around about money is, you know, very lucrative. And I'm thinking to myself, Jesus Christ, you know, this is not my fight." J.A. 1477. Humphries interjected, saying he had seen such pressure before and he sympathized with her. Janowski went on about Barnes:

> "You know, some of the things he pulled trying to ingratiate himself backfired. Like he'll walk around here and he'll say Jesus, look how you live [ ]. My God, bring a little baby to this. You know they don't take care of you. And we'll—we'll right all these wrongs . . . . We'll find a beautiful apartment for you."

J.A. 1479-80. Humphries ("F.H.") then asked, "Honestly, does he still have any reasons to feel this—this idea that somehow ah you know or you said that Mrs. Koller talked to you?" Janowski ("K.J.") replied,

> K.J. No, he wants me . . . he will bet on somebody to say it. They don't give a hoot . . . . They want someone to recall a conversation with Mrs. Koller that she never took Bendectin during that first trimester you know, that she may have taken aspirin, or whatever the hell. I don't know. I wasn't involved then. But they have a transcript of the alleged conversation that they want. You know. "Do you remember? Think about a little more of the conversation." That type of thing.
>
> F.H. Well what do you think about that—that they say they have some transcript.
>
> K.J. Well, that's criminal fraud. I mean if somebody actually said that . . .
>
> F.H. Did you ever talk to Mrs. Koller?
>
> K.J. Well I've talked to her, but only, you know, to ask her if she wanted coffee and oh, you know, get her on the telephone for Nick Allis . . . .

made minor corrections and a few comments confirming its accuracy, and signed it. At Allis' suggestion she wrote

F.H. Did she have . . . Did she ever mention to you anything about the pill or the Bendectin?

J.A. 1480-81.

K.J. I have no trouble with making a statement to that affect [sic] you know. The only contact I would've had with Mrs. Koller, personal contacts. They don't even know about is because it never came up in the conversation. I had sent her a book called "How to Raise a Retarded Child," and said look, I had a little girl once and this book was tremendously interesting to me.

. . . .

And I specifically didn't mention that to them because they said to me, you know, what's been the extent of relationship with Mrs. Koller . . . ? I specifically didn't mention that because then they'd jump up and say ah haa—she was a personal friend of yours and may have confided in you.

J.A. 1488. (The above excerpt appears on a page of the transcript that is out of sequence in the appendix.) Janowski then returned to the subject of harassment by Barnes. She indicated that she might talk to the lawyer "they" had arranged for her to talk to and ask him to "get some kind of restraining order so that nobody comes to see me or at least don't come to see me at the hospital. And so I can get my paycheck and go away. I want to go far away—go to Chicago, go to Mexico, you know." J.A. 1482. Humphries left on a pretext in order to change the tape and returned.

After more discussion about the harassment, Humphries said, "I think the one way that you are going to keep these guys from pestering you and bothering you is to declare once and for all in the clearest, simplest way, that you did not hear Mrs. Koller ever say that she didn't take Bendectin." Janowski repeated, "I have never had any conversation with Mrs. Koller—other than would you like some coffee." J.A. 1490. Humphries stressed that the harassment would probably continue unless she made a statement "saying that what they're trying to put into your mouth isn't true, you know."

K.J. . . . I have no quarrel with that, you know—bring me or send me such a statement or pull it out of your jacket pocket by coincidence—I have no problem.

[Continued]

at the bottom of the statement, "Under penalty of perjury, I swear that the above typed [8] statement is true and correct." The statement reads as follows:

> Last week I was in a state of severe agitation and depression and felt a lot of hostility towards the law [9] firm of Butler, Jefferson, Dan & Allis. Today I feel calm and my mind is free and clear. At no time did I ever hear Cynthia Koller or anyone else say that Cynthia Koller did not take Bendectin. George L. Barnes & Associates, Inc. had been trying to get me to sign a statement saying that I heard Cynthia Koller say that she did not take Bendectin. Such a statement would be false and I would not sign such

[12] [Continued]

F.H. Pull it out Nick [Humphries chuckling] By golly, it just so happens . . .

K.J. This saves me the trouble of typing one myself.

. . .

K.J. . . . I have to cross something out to look like I did something.

F.H. That's right! You understand . . . .

J.A. 1493-94. As she was reading the statement, Janowski noted a spelling error and made several comments: "This is true. They've been making tremendous promises above relocating me within twenty-four hours and make it sound, it sounds to me like a . . . a plane would be chartered to fly me away that would . . . to sunny climes, or whatever. Really, it's been quite flattering. I've never had such attention." "It would have been fun to see what they were willing to pay for that statement. I mean, just for the hell of it!" J.A. 1495.

After more discussion about her dissatisfaction at work and the pressures she had been under, Janowski inquired, "This is not relating to any ah . . . remuneration. But I would like them to have my check and my paycheck for Luis on Friday. It's pretty important to me." Allis agreed. She then stated, "These people aren't going to stop at this. They're going to go to try to find somebody else . . . You think it makes any difference to them who they get." The tape ends at that point.

> a statement for that reason. Mr. Barnes and others have promised that if I signed such a statement they would be able to relocate me and would take care of all my wants and needs including renting a comfortable apartment for me and by [sic] baby. Any conversation I had with George Barnes, Patrick Ryan or any other person from Davis, Polk & Wardwell or George Barnes & Associates was at a time when I [10] was extremely upset and under *great* emotional stress. At the present time my mind is free and clear and everything in this statement is true and correct. I have been promised no remuneration of any kind by any representative of Butler, Jefferson, Dan & Allis for stating these true statements or for anything else.

J.A. 1504 (emphasis in original). Janowski also gave Allis a statement in her handwriting describing the conversation that she said defendants wanted her to "recall" and swear to.[13] She indicated that she would be willing

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[13] The handwritten statement reads as follows:

> Are You OK?
>
> . . . I'm just worried—
>
> You're worried about all these tests?
>
> No, I'm worried about the trial.
>
> Are you afraid it'll be called off again?
>
> No, I'm worried about the experts. Maybe they won't be able to convince the jury that Bendectin is a teratogen.
>
> I don't think that's a problem. Our problem is going to be convincing the jury that you took Bendectin during the first trimester when we know—and you know—that you didn't.
>
> Jim Butler says he can convince the jury it's midnight, even if they can see the sun shining through the courtroom windows.

to make a longer, more detailed statement in the immediate future. She also suggested that she might go to Mexico to get away from the pressures she was under. Finally, Allis discussed with Janowski the possibility of bringing a typewriter to her apartment to allow her to work at home.[14] [11]

On the following day, December 28, 1982, the Butler firm received a copy of a letter which Davis, Polk had sent to the court.[15] The letter stated that Davis, Polk had received two calls on December 22 from a woman identifying herself as Allis' secretary and stating that the *Koller* case was fraudulent. The next day defense counsel had called the court to attempt to set up a conference before Christmas. (In oral argument we learned that in this December 23 call, made several days before the defense first contacted plaintiffs' counsel, defense counsel also told the court's law clerk the substance of Janowski's call.) The letter continued; after identifying the caller as Janowski, defense counsel arranged for "independent counsel" to advise her.[16] The letter stated further that

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Janowski then drew a line and wrote, "The above 'conversation' is the one they want me to 'recall' having," and signed the statement. J.A. 1505.

[14] *See* Hearing of Mar. 15, 1982 (Allis), J.A. 849-50.

[15] The letter appears at J.A. 1461-62.

[16] Although the letter did not identify this "independent counsel," it was Carl Schuck, a member of the Los Angeles firm of Overton, Lyman & Prince. As the transcript of the December 27 conversation shows, *supra* note 11, Janowski made some mention of Schuck to Allis earlier in the day. According to Richard Daum, the paralegal with whom Janowski first spoke on December 26, she denied that Schuck was acting as her lawyer and talked about him as another of the representatives of defendant and "part of their efforts to have her sign a statement which she believed to be false." Affidavit of Daum, Jan. 5, 1983, J.A. 317-18. Allis testified that it was not until he received the Davis, Polk letter on December 28 mentioning "inde-

Janowski had been threatened by the Butler firm with imprisonment if she persisted in a course of disclosure. The letter concluded, "We respectfully request a conference with the Court so that it may, if it deems fit, prevent intrusion by any party or its counsel until the informant and her counsel have had an opportunity to evaluate the substance of the information and, if appropriate, inform the Court." [12]

The same day, December 28, Butler prepared and sent to the court a letter in response, read and approved by Allis, in which he described what contact the firm had had with Janowski in the previous two days and the information she had given them.[17] He added that the firm had learned that, according to Janowski, representatives of the defendant had offered her $15,000 to sign a statement that the case was fraudulent.[18] Butler expressed concern over the situation, especially defendant's conduct, and waived the attorney-client privilege as to any conversations between Janowski and Mrs. Koller. He also enclosed a copy of the statement signed by Janowski the previous evening and a copy of the handwritten description of the purported conversation with

pendent counsel" that it occurred to him that Janowski might be in some way represented by Schuck. Hearing of Mar. 15, 1983 (Allis), J.A. 843-44. Plaintiffs dispute Schuck's independence. *See infra* note 62.

[17] The letter appears at J.A. 1501-03.

[18] On December 27, Janowski called Carol Freeman, a close friend who worked at a law firm in Houston, and told her that an investigator for the defense in the *Koller* case wanted her to remember a telephone conversation that never took place, and offered her $15,000 to testify to the conversation. Affidavit of Carol Freeman, Jan. 17, 1983, J.A. 321. According to Allis, Freeman communicated this information to Richard Daum on the same day. Hearing of Mar. 10, 1983 (Allis), J.A. 668-69.

Mrs. Koller that, according to Janowski, Barnes wanted her to "recall."

On December 29, defense counsel moved for permission to take expedited discovery of Janowski and others. On the same day, one of defendant's attorneys attempted unsuccessfully to get a statement from Janowski. On January 3, 1983, Carl Schuck, the attorney that the defendant arranged for and paid to represent Janowski, wrote to the court stating that his client now disavowed the December 27 statement she had signed for Allis, and that the statement had been obtained under duress and with an offer to continue paying her salary and fringe [13] benefits, including medical benefits for her baby, without requiring her to perform any work.[19]

First, the district court authorized the depositions of Janowski and the father of her child,[20] and additional discovery into the question of when Mrs. Koller took Bendectin, including the depositions of Barnes, Humphries, and the Kollers.[21] The court also ruled as to all these depositions that the plaintiffs' waiver of the attorney-client privilege could not be limited to conversations between Janowski and Mrs. Koller, but would extend to "any discussion relating to the issue of when Cynthia Koller took Bendectin during her pregnancy." [22] Janowski

[19] Schuck's letter appears at J.A. 1511-12.

[20] These depositions were conducted before a Special Master in Los Angeles.

[21] These additional depositions were ordered at a hearing on Jan. 18, 1983. *See* J.A. 582-84.

[22] The Special Master initially issued this ruling as to the Janowski deposition. The ruling was appealed by plaintiffs. In its Order and Memorandum Opinion of Jan. 19, 1983, J.A. 137, the court upheld the ruling and extended it to all future depositions and testimony on the issue.

testified in essence that Mrs. Koller had admitted to her that she had not taken Bendectin in the first trimester,[23] and that she called the Davis, Polk office with this information,[24] but that when Barnes and other representatives of the defendant tried to get a statement from her she had second thoughts. She testified that she lied to Allis, telling him that the defense was bribing her to sign a false statement,[25] and that she signed the December 27 statement for Allis, even though it was false, in return for a promise of continued employment.[26] Plain-[14] tiffs impeached Janowski's credibility with evidence of a history of mental instability, job-related dishonesty and criminal activity, admitted propensity for lying, hostility toward the Butler firm, financial benefits from defendant's firm, prior inconsistent statements, internal inconsistencies, and contrary record evidence.[27] Janowski's counsel, Schuck, acknowledged at the deposition that the defense was paying for the costs of his representation

[23] Deposition of Janowski, Jan. 12, 1983, J.A. 4444-47.

[24] *Id.*, J.A. 4534-36.

[25] *Id.*, J.A. 4556-68.

[26] *Id.*, J.A. 4572-91.

[27] *See* Hearing of Jan. 31, 1983 (Butler), J.A. 596-11 to 596-29 (summarizing impeachment evidence). Although the defendant disputes some of this impeachment evidence, it does not put her forward as a credible witness and it argued to the district court that her credibility was not at issue. Furthermore, the district court viewed as irrelevant Janowski's credibility in general and, in particular, the truth of her assertion that she heard Mrs. Koller admit not taking Bendectin; the court does not appear to have relied on Janowski's testimony in its analysis. *See, e.g.*, Hearing of Mar. 2, 1983, J.A. 621; Hearing of Mar. 7, 1983, J.A. 635, 640, 644. Therefore, although Janowski's testimony is part of the record and would ordinarily seem critical, for the above reasons we give it little weight.

of Janowski, as well as a $600 per month apartment, a rental car, and medical expenses for her baby (to be reimbursed by insurance).[28]

After reading Janowski's deposition and hearing argument from both sides, the court orally ordered the depositions of Allis and one of defense counsel, Patrick Ryan, who had attempted to take Janowski's statement on behalf of the defendant, on February 9. J.A. 600-1. On March 7, the court ordered an evidentiary hearing, during which defense counsel examined Butler, Allis, Dan (another attorney with the Butler firm), Daum, [15] Humphries, Allen Eaton (one of plaintiffs' Washington counsel), and Mrs. Koller. In the depositions and the evidentiary hearing, defense counsel was permitted to inquire in detail into numerous discussions between the plaintiffs and their counsel and within the Butler law firm itself during the previous year and, with respect to the week of December 26 through December 31, into every telephone call, every meeting, and every action within the Butler firm that had any bearing on the case.

Initially, as evidenced by its ruling on the attorney-client privilege and on the scope of additional discovery, the court was concerned with whether Mrs. Koller had taken Bendectin during the critical period as she claimed, and with what counsel knew about that matter. As far

[28] *See* Deposition of Janowski, Jan. 27, 1983, Statement of Schuck, J.A. 1109-13. Defendant contends that Schuck alone determined that the expenses were necessary for Janowski's protection, and that the cost of counsel, the security apartment and other expenses would willingly have been shared if plaintiffs' counsel were so inclined. Plaintiffs dispute these contentions. We express no view as to the propriety of defendant's conduct in this regard. *See infra* pp. 45-46.

as we can tell, this new inquiry gave rise to no motions or rulings by the court at that time based on the supposition that fraud had occurred; the court appeared to be prepared to send to the jury the conflicting evidence on the critical issue of when Mrs. Koller might have taken Bendectin.[29] By March 7, when the court ordered evidentiary hearings into the Janowski episode, the attention of the court had shifted to the question of precisely what Allis' intentions were in preparing and presenting to the court Janowski's December 27, 1982, statement.[30]

Allis testified that his intention was to pursue zealously the interests of his clients, the legitimacy of whose claim he had no reason to doubt. In accordance with his clients' interests, he sought to ascertain the facts surrounding [16] the episode and then, especially in view of the possibility that Janowski might go to Mexico, to obtain a signed statement affirming the essentials of what Janowski had repeatedly related and what he believed to be true—*i.e.*, that representatives of the defendant were pressuring her to sign a false statement "recalling" a conversation in which Koller admitted not taking Bendectin and saying that the case was fraudulent.[31] Allis acknowledged that, in the event Janowski

[29] At a hearing on March 2, the court said: "As far as the merits of Mrs. Koller's case was concerned, Ms. Janowski's testimony can be totally disregarded by the jury. Only the jury can make a determination of whether she's telling the truth or not." J.A. 626.

[30] At the March 2 hearing the court stated that its "major concern" was "what counsel did with respect to Ms. Janowski once it became clear that she had started talking, and excuse the vernacular, out of school." J.A. 627. *See also* Hearing of Mar. 7, 1983, J.A. 630-35.

[31] *See, e.g.*, Hearing of Mar. 10, 1983 (Allis), J.A. 685-87, 692-94, 700-02.

had made such a statement to the defense, the December 27 statement would be a "retraction" of that prior statement.[32]

Allis also acknowledged that he had a strong suspicion by the evening of the 27th that, despite her denials, Janowski might at some point have said something to encourage Barnes and the defendant to the effect that the case was fraudulent.[33] Furthermore, at least by the morning of the 28th when defendant's letter arrived, he and the firm had learned that Janowski had told defense counsel that the case was fraudulent.[34] Allis testified, however, that he still believed without reservation that any such communication was false, and that Barnes and [17] others were pressuring her to sign a statement repeating the false charge.[35]

B. *Butler's Release of Inadmissible Materials to the Press*

In the midst of these events, an unrelated episode involving James Butler also aroused the court's ire and

[32] *See id.*, J.A. 706-07.

[33] *See, e.g., id.*, J.A. 674-77, 683.

[34] There was some dispute in the testimony concerning precisely when various members of the firm, especially Allis, learned—and not merely suspected or inferred—that Janowski had told the defense that Mrs. Koller had not taken Bendectin in the first trimester. The dispute does not appear to us to be either clearcut—there is no direct testimony that Allis actually *knew* of such a statement to the defense—or critical. Allis himself testified, first, that he believed at the time he obtained her statement that Janowski had probably indicated something to the defense to the effect that the case was fraudulent, and second, that one purpose behind the statement was to get a truthful retraction of any such prior false statement. It was Allis' intent that the court viewed as critical.

[35] *See, e.g.*, Hearing of Mar. 10, 1983 (Allis), J.A. 753.

resulted in the revocation of his *pro hac vice* appearance. In support of their contentions that Bendectin was a teratogen and had caused Anne Koller's birth defects, plaintiffs sought to introduce evidence of numerous other instances in which women had taken Bendectin during the critical period and, like Mrs. Koller, had borne children with severely malformed or absent extremities. Defendant moved to exclude this evidence. On January 17, 1983, the district court issued a pretrial evidentiary ruling excluding the "drug experience reports" (DERs) regarding two of those instances—Marco Cordova and Pauline Sands—on which plaintiffs' experts had intended to rely in their testimony. J.A. 131. The court concluded that the dangers of prejudice and jury confusion outweighed any probative value that these case histories might have. J.A. 132-36. In another order dated January 28 and filed January 31, 1983, the court ruled that, of the many other DERs filed with the FDA concerning the alleged link between Bendectin and birth defects, plaintiffs could introduce only five, each of which must have been initiated within one year of the birth of the deformed child. J.A. 157-66.

On January 28, 1983, James Butler sent to FDA Commissioner Hayes fourteen DERs for severely deformed children whose mothers had allegedly taken Bendectin, including Koller, Sand and Cordova. He enclosed medical information and photographs of the children along with a letter urging the FDA to "take this noxious product off the market before it can do any more harm." J.A. 1513. [18] At the same time, Butler sent copies of the DERs and his letter to Hayes to Morton Mintz, a reporter with the *Washington Post* who had often written about drug

companies and the FDA. J.A. 1515. Mintz contacted Butler for an interview which took place on February 1, 1983. Mintz also contacted Merrell-Dow, Richardson-Merrell's successor company.[36]

On February 7, 1983, the Washington Post carried an article by Mintz reporting Butler's claims that Bendectin was a teratogen, along with the comments of FDA officials, "[t]he FDA's most relentless critic, the Public Citizen Health Research Group," and Merrell-Dow, all of which took the position that there was no evidence establishing that Bendectin caused birth defects. The company's representative was quoted as specifically denying that there was a causal link in the Koller case, and as stating in addition that "there is a serious question when Mrs. Koller may have taken Bendectin." J.A. 1516. At the time the Mintz article appeared, the jury panel for February had just been drawn and the parties were preparing for jury selection and a trial expected to commence in the next few weeks. Primarily as a result of the article and the disqualification proceeding it helped to trigger, the trial was postponed.

In two affidavits filed in February and May, 1983, in response to a motion by the defendant to impose sanctions on the Butler firm, Butler denied any intent to influence the jury in circumvention of the January evidentiary rulings. J.A. 271, 273-74. Butler stated as his sole motivation that over two years of research on Bendectin had convinced him that it was a dangerous drug that should be taken off the market without further delay. Apparently as an explanation for the particular timing of the

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[36] *See supra* note 3.

release on January 28, he averred that not until January had he received authorization from the parents to release [19] the information to the FDA and the press. J.A. 273. He declined the court's suggestion that he testify in person as to the explanation for his conduct.

C. *Proceedings on the Motion to Disqualify*

On February 7, the day the Mintz article was published, the defendant moved to disqualify the Butler firm on the basis of both the Janowski episode and, especially, Butler's release of the DERs. After an evidentiary hearing in March, 1983, on the Janowski episode, the court issued on April 29, 1983, an Order to Show Cause why the Butler firm should not be disqualified from further representation of plaintiffs because of the conduct of both Butler and Allis:

> 1) James Butler's January 31, 1983, release of information concerning defendant's experience with Bendectin, Thalidomide, and MER-29, including fourteen [DERs], to the [FDA] and the Washington Post in an effort to prejudice the jury pool awaiting selection for the contemplated trial of this action in February or March and to bring inadmissible evidence before the jury pool in contempt of three separate evidentiary rulings previously entered by the Court;
>
> 2) Nicholas Allis' preparing and obtaining a statement from Krystyna Janowski retracting her previous statement to defendant that the instant case was fraudulent without regard for the truth of Ms. Janowski's retraction in an apparent attempt to protect the Butler firm's financial interest in this and other related matters by thwarting any further investigation into the circumstances surrounding and the basis for Ms. Janowski's original statement."

J.A. 207-08. After additional hearings in June and July, again focusing primarily on Allis' conduct in the Janowski episode, the court issued its ruling on January 6, 1984, revoking the *pro hac vice* appearances of Butler and [20] Allis and disqualifying the firm from further appearances in the case.

The court determined first that because "an attorney's admission *pro hac vice* in a case is the granting of a privilege and not a right," the revocation of *pro hac vice* admission was similarly discretionary and was justified whenever "the conduct of the attorney was so impermissible as to warrant" such a sanction. Memorandum Opinion of Jan. 6, 1984, at 4-5 [hereinafter cited as "Opinion"], J.A. 236-37. The court went on to find that the conduct of both Allis and Butler was "so impermissible" as to warrant revocation of their appearances and disqualification of their firm.

The court held that "[t]here is no doubt that Allis, under the broad provisions of Canon 7 and Canon 2 of the Code, has the duty and ethical obligation to not only zealously pursue the interests of his clients but also to investigate whether Cynthia Koller was committing a fraud upon the court thereby making this suit worthless and a waste of judicial resources," citing DR 7-102(A) (3), 7-102(A) (6), and DR 2-110(B)(1). Opinion at 6, J.A. 238. The court found that Allis' primary purpose in securing the statement from Janowski was to obtain a "retraction." In addition the court found fault in

> 1) Allis' collaboration with Humphries to surreptitiously record a portion of his conversation with Janowski; 2) Allis' testimony under oath that he had no intention of informing the court of the results of his "investigation"; 3) Allis' failure to read the prepared statement line-by-line to Janowski to insure that she understood the contents of the statement before signing; and 4) Allis' procurement of the statement irrespective of the erratic behavior displayed by Janowski during his visit on December 27.

Opinion at 6-7, J.A. 238-39. The court concluded,

> At best, Allis' conduct can be characterized as an attempt to thwart a true investigation of a crucial [21] witness in this case in pursuit of protecting the interests of his clients. Clearly, this is not the nature of an investigation where the objective is to ascertain the truth and thereby to assist in preventing any acts of fraud upon the court. *See* DR 7-102(B)(1).

Opinion at 7, J.A. 239.

Turning to the conduct of James Butler, the court found that "Butler's knowing release to the Post of information previously ruled inadmissible . . . was a flagrant circumvention of the Orders of this Court." Opinion at 8, J.A. 240. Butler's refusal to supplement his affidavits by explaining his action in court "merely buttress[es] the Court's conclusion that his release of the DERs to the media was calculated to prejudice the defendant's case and circumvent the Court's prior rulings." *Id.*

Observing that disqualification of the Butler firm would not be fatal to the plaintiffs' case insofar as "remaining

counsel [could] provide the plaintiffs with competent counsel," *id.*, the court concluded that "the course of conduct of plaintiffs' counsel as a whole was so impermissible as to warrant this Court's exercise of its discretion to revoke the *pro hac vice* appearances of Nicholas Allis and James Butler, thereby disqualifying the Butler firm from further representation of the plaintiffs in this case." Opinion at 9, J.A. 241.

Plaintiffs and their counsel appealed. On their emergency motion, we stayed all proceedings pending an expedited appeal.[37] We determine first whether we have jurisdiction to review this interlocutory order.

II. Reviewability

The final judgment rule embodied in 28 U.S.C. § 1291 bars interlocutory appeals in all but a small class of [22] orders "which finally determine claims of right separable from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole cause is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). To fall within this narrow exception, the order for which review is sought, "[f]irst, 'must conclusively determine the disputed question'; second, it must 'resolve an important issue completely separate from the merits of the action'; third, it must 'be effectively unreviewable on appeal from a final judgment.' *Flanagan* v. *United States*, 104 S.Ct. 1051, 1055 (1984) [hereinafter cited as

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[37] Koller v. Richardson-Merrell, Inc., No. 84-5039 (D.C. Cir. Jan. 27, 1984), J.A. 243.

"Flanagan"] (*quoting Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)).

In *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 373-78 (1981), the court held unreviewable an order denying a motion to disqualify counsel in a civil case, leaving open the question of the appealability of an order granting such a motion or an order in a criminal case granting or denying such a motion. In the years following *Firestone*, all courts of appeal that considered the question, including this court in *Groper* v. *Taff*, 717 F.2d 1415, 1417 (D.C. Cir. 1983), concluded that orders disqualifying counsel in civil cases were appealable under the standards articulated in *Cohen* and *Coopers & Lybrand*.[38] In *Groper*, we emphasized that "an order [23] granting disqualification in a civil case is, as a practical matter, 'effectively unreviewable' on appeal from a final judgment on the merits." 717 F.2d at 1417. We cited *Duncan* v. *Merrill Lynch, Pierce, Fenner & Smith*, 646 F.2d 1020, 1026-27 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981), in which the Fifth Circuit considered at length the application of the *Cohen* test to disqualification orders. The court in *Duncan* concluded that the effect of the disqualification order is "immediate and measurable. The party opposing the motion is abruptly deprived of his

[38] *See, e.g.*, Greitzer & Locks v. Johns-Manville Corp., 710 F.2d 127 (4th Cir.), *cert. denied*, 103 S. Ct. 364 (1982); General Mill Supply Co. v. SCA Serv., Inc., 697 F.2d 704, 706 (6th Cir. 1982); Gough v. Perkowski, 694 F.2d 1140, 1141-45 (9th Cir. 1982); Norton v. Tallahassee Memorial Hospital, 689 F.2d 938, 941 (11th Cir. 1982), *reh'g denied*, 700 F.2d 617 (11th Cir. 1983); Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 717-21 (7th Cir. 1982); Glueck v. Jonathan Logan, Inc., 653 F.2d 746, 748 n.2 (2d Cir. 1981); Duncan v. Merrill Lynch, Pierce, Fenner & Smith, 646 F.2d 1020, 1026-27 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981).

counsel, and, provided he desires to proceed with his action, the litigation is disrupted while he secures new counsel." *Id.* at 1027. In addition, the court saw little possibility of vindication on appeal from a final judgment. It would be, the court pointed out, "an almost insurmountable burden" for the losing party "to show that he lost the case because he was improperly forced to change counsel." *Id.* (quoting *Armstrong* v. *McAlpin*, 625 F.2d 433, 440-41 (2d Cir. 1980), *vacated on other grounds*, 449 U.S. 1106 (1981)).

Very recently, however, the Supreme Court determined in *Flanagan* v. *United States*, 104 S.Ct. 1051, that a disqualification order in a criminal case was not immediately appealable.[39] At the outset the Court stressed that the policy underlying the final judgment rule "is at its strongest in the field of criminal law," *id.* at 1054 (quoting *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982)), and that exceptions permitting interlocutory appeals in criminal cases were accordingly very rare.[40] The rationale for such a stringent application [24]

[39] The Court thus overruled numerous contrary decisions of the courts of appeals. *See Flanagan*, 104 S.Ct. at 1053 n.2, and cases cited, *But see* United States v. Greger, 657 F.2d 1109, 1110-13 (9th Cir. 1981), *cert. denied*, —— U.S. ——, 103 S.Ct. 189 (1983) (disqualification order in criminal case not immediately appealable).

[40] The collateral order doctrine has thus far been interpreted to permit interlocutory appeals in criminal cases only in three narrow circumstances: an order denying a motion to reduce bail, Stack v. Boyle, 342 U.S. (1951), which would become moot on conviction, and orders denying motions to dismiss an indictment on grounds of double jeopardy, Abney v. United States, 431 U.S. 651 (1977), or the speech or debate clause, Helstoski v. Meanor, 442 U.S. 500 (1979), both of which guarantee the right not to be tried at all. *See Flanagan*, 104 S.Ct. at 1055.

of the final judgment rule in criminal cases lies in the common interest of the defendant, the prosecution and the public in the prompt adjudication of guilt or innocence, an interest embodied in the constitutional right to a speedy trial. *Id.* at 1054-55. The defendant now argues that, although it has not actively opposed immediate review in this case, "the reasoning of the Court in *Flanagan* supports the conclusion that orders disqualifying attorneys in civil cases are not appealable." Memorandum of Defendant-Appellee concerning Appellate Jurisdiction at 10. We disagree. We conclude, with the Second Circuit, *see Interco Systems, Inc.* v. *Omni Corporate Services,* Docket Nos. 84-7008, 84-7012, slip op. at 3334 (2d Cir. Apr. 30, 1984), that *Flanagan* does not bar the immediate appeal of disqualification orders in civil cases. [25]

In civil cases there is no equivalent to the constitutional right to a speedy trial, which protects the interest of the defendant, strongly shared by the prosection and the society as a whole, in prompt adjudication, and which demands extraordinary limits on the collateral order doctrine. Thus, while courts have interpreted the collateral order doctrine extremely narrowly in criminal cases, they have permitted the immediate appeal of a variety of orders in civil cases.[41]

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[41] *See, e.g.,* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978) (order allocating expenses of identifying class members); McSurely v. McClellan, 697 F.2d 309, 315-16 (D.C. Cir. 1982) (order denying government officials absolute or qualified immunity); Story v. Robinson, 689 F.2d 1176 (3d Cir. 1982) (order allocating costs of transporting plaintiff prisoners to court appearances); United States v. CBS, Inc., 666 F.2d 364 (9th Cir.), *cert. denied sub nom.* CBS, Inc. v. Columbia Pictures Indust., 457 U.S. 1118 (1982) (order denying motion of non-party witness for reimbursement of costs incurred in supplying subpoenaed documents); United States v. AT&T, 642 F.2d 1285, 1295-96 (D.C. Cir. 1980) (discovery order where compliance would allegedly violate work product privilege).

Not only is the constitutional requirement of speedy adjudication lacking in civil cases, but it has become apparent that the interests of the parties in proceeding expeditiously may diverge significantly. The tactical use of motions to disqualify counsel in order to delay proceedings, deprive the opposing party of counsel of its choice, and harass and embarrass the opponent has become so prevalent in large civil cases in recent years as to prompt frequent judicial and academic commentary. *See, e.g., Board of Education of New York City* v. *Nyquist,* 590 F.2d 1241, 1246 (2d Cir. 1979); *Williamsburg Wax Museum* v. *Historic Figures, Inc.,* 501 F. Supp. 326, 331 (D.D.C. 1980), *aff'd sub nom. National Souvenir Center, Inc.* v. *Historic Figures, Inc.,* Nos. 82-2329, *et al.,* slip op. at 27-28 (D.C. Cir. Feb. 10, 1984); Crocker, "The Ethics of Moving to Disqualify Opposing Counsel for Conflict of Interest," 1979 Duke L.J. 1310; Comment, 45 U. Chi. L. Rev. 450 (1978). We are aware of no comparable phenomenon in criminal cases. The apparent interest of many civil litigants in delaying adjudication and their use of disqualification motions to help accomplish that end militate in favor of immediate review of orders granting such motions. To insulate from prompt review an erroneous order granting a motion to disqualify counsel would only raise the stakes in this dangerous game. Of course, these policy considerations do not alleviate the necessity for meeting the three-part test of *Cohen* and *Coopers-Lybrand;* they do, however, caution against an overly mechanical application of the *Flanagan* analysis in the context of a civil case. [26]

For an order to be immediately appealable under *Cohen,* it must first "conclusively determine the disputed question." The Court in *Flanagan* did not consider whether a disqualification order in a criminal case met this first criterion,

but in any event we reaffirm our conclusion in *Groper* that an order disqualifying counsel in a civil case "conclusively determine[s] the disputed question." *See Groper* v. *Taff*, 717 F.2d at 1417. *Cf. Firestone*, 449 U.S. at 375 (order denying disqualification conclusively determines question). The first part of the *Cohen/Coopers-Lybrand* test is therefore met. It is the Court's application of the second and third parts of the test in *Flanagan*—requiring that the order resolve an issue separate from the merits and that it be effectively unreviewable on appeal from a final judgment—that demands a deeper probe into the vitality of our holding in *Groper* v. *Taff*.

In *Flanagan*, the court was faced with the criminal defendants' assertion that the disqualification order was erroneous and violated their sixth amendment right to counsel. The Court expressed no view as to whether the constitutional right asserted was such that an erroneous disqualification of chosen counsel would result in reversal of a conviction automatically or only upon a showing of prejudice, but found at least one of the *Cohen* criteria unsatisfied in either case. If erroneous disqualification would result in automatic reversal, then the order was not "effectively unreviewable on appeal from a final judgment." 104 S.Ct. at 1056. If, on the other hand, the right would be violated only if prejudice resulted, then the validity of the order would not be independent of the issues tried and could only be evaluated after the trial was complete. *Id.* at 1056-57. In either case, then, one of the three requirements for immediate review would not be met.

We do not believe that the Court's "either/or" analysis in *Flanagan* can be appropriately applied in the civil con-[27] text. Unlike a criminal case, there is in a civil case no

constitutional right to counsel, the deprivation of which might result in automatic reversal of an adverse judgment. *Cf. Flanagan*, 104 S.Ct. at 1056. In that respect the *Flanagan* analysis is inapplicable. Only an erroneous disqualification combined with prejudice at trial could conceivably result in outright reversal of a civil judgment. Yet it would appear virtually impossible to show prejudice resulting from the absence of one counsel and the substitution of another. In a criminal case, a reviewing court could at least draw from the extensive body of law concerning effective assistance of counsel as a first step in determining whether substitute counsel's performance prejudiced the defense so as to require reversal.[42] In the civil context, however, the court would be without a starting point; because there is no sixth amendment right involved, there is no body of law to help a court evaluate whether a civil judgment should be overturned because of the quality of counsel's representation. The court would be relegated to the realm of after-the-fact speculation about whether the disqualified counsel would have devised a superior strategy, been more persuasive and appealing to the jury, more effectively cross-examined the opposing party's witnesses, and so on. We agree with the Fifth Circuit in *Duncan*, 646 F.2d at 1027, that the party attempting to obtain relief from an erroneous disqualification order after losing its case-in-chief would bear "an almost insurmountable burden."

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[42] Of course, we do not imply that, in case a showing of prejudice were necessary, a criminal defendant would have to show that the quality of substitute counsel's representation fell below the constitutionally minimum standard for effective assistance of counsel in criminal cases. We suggest only that appellate courts have considerable experience—not duplicated in civil cases—in evaluating whether shortcomings in the representation of a criminal defendant require reversal of a conviction.

The difficulty in showing prejudice would be particularly acuted if, for instance, plaintiffs were awarded a [28] judgment but the damages fell far below what they believe they were entitled to and what they believe their chosen counsel could have obtained. On the other hand, if the civil litigant were unable to retain adequate substitute counsel willing to take over in midstream, perhaps on a contingency fee basis, and were forced to dismiss the case voluntarily, it is not clear that any appeal would be available. In a criminal case, of course, the defendant has a constitutional right to effective assistance of counsel. Our concerns about the difficulty of demonstrating prejudice at the end of a case are only heightened by the fact that neither party cites a single case in which a civil judgment on the merits of a case was reversed because of an erroneous disqualification of counsel.[43] For all of these reasons, in a civil case more certainly than in a criminal case, the disqualification order would be, "as a practical matter, 'effectively unreviewable' on appeal from a final judgment on the merits," *Groper* v. *Taff*, 717 F.2d at 1417, and thus meets the third criterion of *Cohen*. We would have grave misgivings about denying immediate review of an order depriving civil litigants of counsel of their choice when it is clear that there can be no effective review at the end of the case.

Flanagan's analysis of the second *Cohen* requirement—that the issue be completely separate from the merits of the action—is similarly inapplicable. The Court in *Flanagan* determined that if the criminal defendants' rights would be violated by the disqualification order and their convic-

[43] We do not place too much significance on this fact, since most such orders have probably been appealed and reviewed before judgment, as in the case before us.

tions reversed only if the prejudice resulted at trial, then the order's "validity cannot be adequately reviewed until trial is complete," and would not be independent of the issues at trial. Defendant argues here that since a final judgment in its favor would be reversed only if plaintiffs could show that the disqualification order was erroneous *and* that it prejudiced their case, the "validity" [29] of this order would depend on the events at trial. We reject this argument for several reasons.

As we have already discussed, it would be virtually impossible for plaintiffs here to show that prejudice resulted at trial from an erroneous disqualification. On the other hand, the extensive record now before us presents an entirely adequate basis for determining whether the district court's order was proper. That determination does not depend on subsequent events at trial, does not require us to "make any step toward final disposition of the merits of the case and will not be merged in final judgment." *Cohen*, 337 U.S. at 546.

As best we can discern, the Supreme Court in *Flanagan* viewed as "invalid" only those erroneous disqualification orders that violate a defendant's sixth amendment right and thus require reversal of a conviction—whether because of presumptive or demonstrated prejudice. We must conclude that this unusual view of an order's "validity" is based on considerations that are peculiar to criminal cases and do not extend to the civil context. First, of course, the defendants' assertion of their sixth amendment right to counsel as the basis for their claim may have led the Court to equate the "validity" of a disqualification order with the absence of a sixth amendment violation. We cannot perform that equation in a civil case, since there is no equivalent consti-

tutional right at issue. Second, because of the particularly strong shared interests of the defendant, the state and the public in a speedy adjudication of guilt or innocence in criminal cases, the Court may have been especially unwilling to permit an interlocutory appeal merely to correct an erroneous ruling where the defendant might still be acquitted or, in case prejudice is not to be presumed but must be demonstrated, where no prejudice may result. The extraordinary concern for prompt adjudication in criminal cases thus provided additional reason in *Flanagan* to reject the usual distinction between error, which in circumstances like those before us can be determined independent of the [30] issues at trial, and prejudicial error requiring reversal of the judgment, which often cannot.

The court in *Flanagan* concluded that the question for which review was sought—whether the disqualification order violated the defendants' sixth amendment right to counsel—was either fully reviewable on completion of the trial or *not* fully reviewable *until* the completion of the trial. We conclude, in contrast, that the order appealed from in this civil case would be effectively unreviewable on appeal from a final judgment, and is properly reviewable on the record now before us.

One final consideration recommends the availability of immediate review in this case. Denying review in the case before us could irremediably prejudice not only the important interests of the clients in counsel of their choice but also the interest of the attorneys, who are parties to this appeal, in correcting what they claim is an erroneous finding of misconduct. The interest of counsel is an issue that was not even considered by the Court in *Flanagan*, where only

the defendants appealed. In any event, the basis for disqualification in *Flanagan* was simply the potential for conflict arising from counsel's representation of multiple defendants, *see* 104 S.Ct. at 1052-53, and not unethical conduct carrying with it great stigma and serious consequences for the attorney's professional reputation. In the event that plaintiffs were satisfied with the final verdict obtained by substitute counsel, the disqualified attorneys could be left with no means whatsoever of vindicating their own important interests on appeal from a final judgment. *See Duncan*, 646 F.2d at 1027. The interest of counsel in this case further bolsters our conclusion that a disqualification order in a civil case such as this is appealable under the collateral order doctrine. Even assuming that *Flanagan* would preclude immediate review of a disqualification order in a criminal case where counsel asserted its own interest in correcting a stigmatizing ruling, the reasonable assertion of those interests in a civil case, in which the collateral [31] order doctrine has been given somewhat broader application, provides additional grounds for affording immediate review of the disqualification order here.

For all of the above reasons, we conclude that *Flanagan* does not require us to depart from our recent decision in *Groper* v. *Taff*, 717 F.2d 1415, holding that orders disqualifying counsel in civil cases are immediately appealable under the collateral order exception to the final judgment rule. We proceed now to the merits of the disqualification order.

III. Issues

The district court has wide discretion in the exercise of its duty to supervise members of the bar appearing before it. *See Groper* v. *Taff*, 717 F.2d at 1418. In reviewing

the court's decision, we are bound to accept the court's findings on disputed issues of fact unless they are clearly erroneous. The district court's conclusions of law, including its interpretation of the Code of Professional Responsiblity, and its application of the law to the facts are of course subject to appellate review for legal error.[44]

A. *Preliminary Observations*

Butler and Allis, who do not maintain offices in the District of Columbia, may enter an appearance before the district court not as a matter of right, but only with joint local counsel and with the permission of the district court to appear *pro hac vice*.[45] The district court deemed it "well settled that an attorney's admission *pro hac vice* in a case is the granting of a privilege and not a right." Opinion at 4, J.A. 236 (citing *In re Belli*, 371 F. Supp. 111 (D.D.C. 1974)). The court concluded on that basis [32] that there was "no strict test for determining whether a non-resident attorney's pro hac vice appearance in a case should be revoked during the course of a trial," and that "conduct which may fall short of a violation of a Disciplinary Rule of the Code of Professional Responsibility may be sufficiently impermissible to warrant the denial or revocation of an attorney's pro hac vice appearance." Opinion at 4-5, J.A. 236-37.

We cannot agree with the judge's premise that *pro hac vice* counsel, once admitted, are subject to disqualification

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[44] Although the standard of review in *Groper*, in which the critical issue was factual, was abuse of discretion, we indicated that "a less deferential standard of review may be appropriate when . . . only a purely legal question is at issue." 717 F.2d at 1418 n.4.

[45] Local Rule 1-4(a)(1) of the U.S. Dist. Ct. for D.C.

more readily than are regularly admitted counsel. Nothing in the local rules of the district court [46] or in our cases suggests such a distinction. Our recent decision in *Groper* v. *Taff*, 717 F.2d 1415, involved the disqualification of counsel admitted *pro hac vice*. *Id.* at 1419. This fact was noted only parenthetically and in no way affected our resolution of the question of whether he had been properly disqualified. Like the Third Circuit, "we think it clear that limited to one case though the right of these attorneys to practice was, their standing with respect to this case was no different from that of any other regularly admitted local lawyer." *Cooper* v. *Hutchinson*, 184 F.2d 119, 123 (3d Cir. 1950).[47] Particularly in the federal courts of the District of Columbia, we think it would be unwise to introduce into litigation an unwar[33]ranted disadvantage against parties with non-resident counsel by subjecting that counsel more readily to removal. We thus conclude that the district court's premise that *pro hac vice* counsel may be disqualified more readily than regularly admitted counsel, was erroneous.

Appellees contend, however, that the conduct of Allis and Butler provides adequate grounds for disqualification under the standards applicable to regularly admitted attorneys. Local Rule 4-3(IV) of the District Court for the

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[46] Local Rule 4-3 (VII) provides that attorneys admitted *pro hac vice* are, like regularly admitted attorneys, subject to the disciplinary jurisdiction of the court. Rule 4-3 (IV), *see infra* p. 33, sets out general "Standards for Professional Conduct" for "any attorney admitted to practice before this court," and draws no distinction between local counsel and specially admitted counsel.

[47] We recognize that this is dictum; neither Cooper v. Hutchinson nor the Third Circuit's later case, Johnson v. Trueblood, 629 F.2d 302 (3d Cir. 1980), resolved the question of what substantive standards were to be applied in determining whether to revoke an attorney's *pro hac vice* appearance; each dealt instead with the procedural aspects of such an action.

District of Columbia provides for disciplinary action, after notice and hearing, against attorneys for "misconduct defined in these Rules, and for good cause shown." Misconduct is defined as "[a]cts or omissions . . . which violate the [District of Columbia] Code of Professional Responsibility . . . except as otherwise provided by specific Rules of this court." Our task, then, is not only to determine whether Allis and Butler have violated the Code of Professional Responsibility, but if so, whether there is good cause for the particular disciplinary action taken by the court.

The two episodes of alleged misconduct before us in this case are fundamentally different from others in which we have previously upheld disqualification. We have approved or even on occasion mandated disqualification where a conflict of interest—potential or actual—between current clients undermined the court's confidence in counsel's ability to serve each client with undivided loyalty, *see, e.g., Yablonski* v. *United Mine Workers,* 454 F.2d 1036 (D.C. Cir. 1971), *cert. denied,* 406 U.S. 906 (1972); *Yablonski* v. *UMW,* 448 F.2d 1175 (D.C. Cir. 1971); where a lawyer would likely be called as a witness in the main case, thus compromising his effectiveness as an advocate, *Groper* v. *Taff,* 717 F.2d 1415, 1418 (D.C. Cir. 1983); or where counsel's prior work on the same or related matters as a government official may create an appearance of impropriety in contraven[34]tion of DR 9-101(B). *Kessenich* v. *Commodity Futures Trading Commission,* 684 F.2d 88, 98 (D.C. Cir. 1982).[48]

[48] Defense counsel relies on Laughlin v. Eicher, 145 F.2d 700, 702 (D.C. Cir. 1944), *cert. denied,* 325 U.S. 866 (1945) and Viereck v. United States, 130 F.2d 945, 961-62 (D.C. Cir. 1942), *rev'd on other grounds,* 318 U.S. 236 (1943), for the proposition that this court has not heretofore imposed strick limitations on the power of the district court to disqualify counsel. *Laughlin* concerned the disqualification of defense counsel in a sedition trial after counsel filed an impeachment petition against the judge and made statements in court and in the petition that this court characterized as "highly derogatory," "fantastic," and "a public profession of contempt for [the judge's] character." 145 F.2d at 702. The case is, in short, highly exceptional and does not affect our conclusion here that disqualification is *rarely* warranted in cases not falling into the pattern delineated in text. In *Viereck,* the district court "ejected" defense counsel summarily on the basis of counsel's statement, after a ruling foreclosing certain testimony, that the court was "biased in favor of the Government and prejudiced against this defendant." 130 F.2d at 961. Our decision over 40 years ago approving the court's summary disqualification as "perfectly proper" is of dubious authority, at least in light of current case law concerning the procedural rights of attorneys. *See, e.g.,* Johnson v. Trueblood, 629 F.2d 302 (3d Cir. 1980).

Similarly, the Second Circuit in surveying its own cases, concluded that

> "with rare exceptions, disqualification has been ordered only in essentially two kinds of cases: (1) where an attorney's conflict of interests in violation of Canons 5 and 9 of the Code of Professional Responsibility undermines the court's confidence in the vigor of the attorney's representation of his client, or more commonly (2) where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation, for example, in violation of Canons 4 and 9, thus giving his present client an unfair advantage.

Board of Education of New York City v. *Nyquist,* 590 F.2d 1241, 1246 (2d Cir. 1979) (citations and footnotes [35] omitted). Although our own cases, fewer in number, cannot be so neatly categorized, they are basically consistent with the Second Circuit's admonition that "unless an attor-

ney's conduct tends to 'taint the underlying trial,' by disturbing the balance of the presentations in one of the two ways indicated above, courts should be quite hesitant to disqualify an attorney." *Id.* at 1246 (citation omitted). Indeed, we see much wisdom in the view expressed by Judge Mansfield in concurrence:

> The attorney is the client's choice. Disqualification is wasteful and time-consuming. Only where the attorney's unprofessional conduct may affect the outcome of the case is there any necessity to nip it in the bud. Otherwise conventional disciplinary machinery should be used and, if this is inadequate, the organized bar must assume the burden of making it effective as a deterrent.

Id. at 1247-48.

We agree that disqualification is warranted only rarely in cases where there is neither a serious question as to counsel's ability to act as a zealous and effective advocate for the client, *see, e.g., Groper* v. *Taff*, 717 F.2d at 1418; *Yablonski* v. *UMW*, 448 F.2d 1175, nor a substantial possibility of an unfair advantage to the current client because of counsel's prior representation of the opposing party, *cf. Williamsburg Wax Museum*, 501 F. Supp. 326, or prior responsibility as a government official, *see Kessenich*, 684 F.2d 88. Except in cases of truly egregious misconduct likely to infect future proceedings, other means less prejudicial to the client's interest than disqualifying the counsel of her choice are ordinarily available to deal with ethical improprieties by counsel.[49] With [36] these general consid-

[49] For example, the court may issue a formal reprimand or, in more serious cases, a contempt citation either during or after the proceedings; it may also refer possible ethical improprieties to the disciplinary bodies of the local bar or, in the case of attorneys admitted *pro hac vice*, to the bar of the attorney's home state.

erations in mind, we proceed to an analysis of the alleged misconduct by Allis and Butler.

B. *The Episode Involving Allis*

The district court found that Allis' purpose in visiting Janowski was to obtain a "retraction" of a prior statement to defense counsel that Mrs. Koller had not taken Bendectin when she claimed she did. The court recognized that Allis' conduct was at least arguably "in pursuit of protecting the interests of his clients," but concluded that it was inconsistent with a countervailing duty "to investigate whether Cynthia Koller was committing a fraud upon the court." The court cited several provisions of the Code of Professional Responsibility ("Code")—DR 2-110(B)(1) and DR 7-102(A)(3), (A)(6), and (B)(1)—without clearly finding Allis in violation of any of them.

1. *Standards of Conduct*

Counsel in both criminal and civil cases frequently face situations in which there is some evidence tending to cast doubt upon the credibility of the client or the validity of the claim. Yet the adversary system is based on the premise that the truth is best ascertained in such instances through the zealous and competent presentation by each side of its strongest case. The fundamental obligation of an attorney to his client—the bedrock principle of the adversary system—does not dissolve with the appearance of unfavorable evidence or even an allegation of fraud. The attorney's duty

to the client is, of course, not without limits. In the familiar words of Canon 7 of the Code, "[T]he duty of a lawyer, both to his client and to the legal system, is to represent his client zealously *within the bounds of the law*." EC 7-1 (emphasis added). The legal profession continually struggles to define the point at which the attorney's basic loyalty to the client must [37] give way, for that point is very much at the heart of the adversary system.

The Disciplinary Rules of the Code cited by the district court set out standards that are designed to guide attorneys through the numerous and difficult ethical dilemmas that an advocate confronts. Thus, DR 7-102(a)(3) states that a lawyer shall not "[c]onceal or knowingly fail to disclose that which he is *required by law* to reveal" (emphasis added). According to DR 7-102(a)(6), "a lawyer shall not . . . [p]articipate in the creation of evidence when *he knows or it is obvious* that the evidence is false" (emphasis added). DR 7-102(B)(1) provides that "[a] lawyer who receives information *clearly establishing* that . . . [h]is client has, in the course of the representation, prepetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same" (emphasis added). Furthermore, a lawyer is required to withdraw from representation of a client if "[*h*]*e knows or it is obvious* that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation merely for the purpose of harassing or maliciously injuring any person." DR 2-110(B)(1) (emphasis added).

The Disciplinary Rules require objective and informed recognition by an attorney that specific evidence or a client's claims are fraudulent before imposing on the attorney an affirmative obligation to take actions that may be contrary

to the interests of the client. An attorney faced with a potential conflict between the duty to the client and the duty not to perpetrate a fraud on the tribunal is entitled to rely on the standards of the Code of Professional Responsibility and should not be disqualified for conduct that falls within the general ambit of those provisions but does not violate the Disciplinary Rules. To permit disqualification for purported misconduct that falls short of a violation of these standards might well penalize conduct that could reasonably be deemed mandatory in fulfilling the duty to pursue zeal-[38]ously the interests of the client. The local rules of the district court, which define attorney misconduct primarily in terms of the Code, thus embody a conclusion that fairness and the logic of the adversary system in any event compel.

2. *The Propriety of Allis' Conduct*

It appears that the district court, perhaps because of its erroneous premise that *pro hac vice* counsel could be more readily disqualified than regularly admitted counsel, strayed from the strict standards derived from the Code. First, the court began its discussion by stating as a general rule that "conduct which may fall short of a violation of a Disciplinary Rule of [the Code]" may warrant revocation of a *pro hac vice* appearance. Consistent with this premise, nothing in the opinion finds Allis guilty of a violation of the Code, but rather postulates on the basis of several disciplinary rules a general duty to initiate or foster a "true investigation" and thereby "to assist in preventing any acts of fraud upon the court." The court found Allis' effort "to obtain a retraction" from Janowski inconsistent with that general duty. Yet the court made no explicit or implicit

finding that Allis did not or could not reasonably believe in the good faith of his client's claim—in particular Mrs. Koller's assertion that she took Bendectin in the first trimester—or in the truth of the "retraction" he obtained from Janowski. The court did not even incorporate or refer to the language of its preliminary Order to Show Cause, suggesting that Allis sought to obtain a retraction "without regard for [its] truth." [50] [39]

We certainly cannot read the court's opinion as finding that Allis "knew or it was obvious" that the statement was false or that the Kollers' claim was in bad faith, or that Allis had evidence "clearly establishing" that Mrs. Koller had perpetrated a fraud on the court. In the absence of any finding—or indeed any evidence—that Allis knew or that it was obvious that Janowski's claims to him were false or his clients' case fraudulent, we can find no impropriety in his visit to Janowski for the purpose of obtaining a "retraction" of any damaging and, according to Allis' belief, false statements made to the defense.[51]

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[50] Three days of hearings and eight months of deliberation intervened between the Order to Show Cause and the final decision. We therefore decline to read the allegations of the Order to Show Cause as findings of fact by the district court, as the defendant appears to urge us to do. *See, e.g.*, Brief for Appellee at 17, 43, 44.

[51] The defendant argues that Allis' conduct is at least as blameworthy as the conduct found to to warrant revocation of *pro hac vice* status in United States v. Madsen, 148 F. Supp. 625 (D. Alaska 1957). In *Madsen*, the defense attorney in a murder case had trespassed on police property, entered the car in which the victim was shot, and physically altered the appearance of the bullet hole. *Id.* at 628. Defendant's attempt to analogize Allis' conduct to that in *Madsen* must be characterized as advocacy in the extreme, and only highlights the equivocal nature of the charges against Allis. Other cases relied on by the defendant involve lawyers bribing or coercing witnesses not to testify or to testify falsely. *See, e.g.*,

Nor can we condemn several specific aspects of Allis' conduct found objectionable by the district court. According to the district court, Allis testified "under oath that he had no intention of informing the court of the results of his 'investigation'." Opinion at 6-7, J.A. 238-39. Allis actually testified that at the time he prepared and obtained a statement from Janowski, he had no fixed idea of how he would use it.[52] But we have found no basis in any event for the district court's implicit assumption that Allis had a duty, immediately upon discovering that his secretary may have cast aspersions on the good faith of his client's case, to bring this matter to the court's atten-[40] tion. Unless "he [knew] or it [was] obvious" that the Kollers' claim was fraudulent, Allis' primary duty was to investigate on behalf of his clients.

The court also criticized "Allis' failure to read the prepared statement line-by-line to Janowski to insure that she understood the contents of the statement before signing." Opinion at 7, J.A. 239. But in the light of Allis' uncontradicted testimony that the substance of the statement simply put in writing what Janowski had repeated to Allis several times throughout the day and had indeed restated in the very conversation during which she read and signed the statement, we can find no fatal shortcoming in this aspect of Allis' conduct.

Furthermore, we cannot agree with the district court's conclusion that Allis acted improperly in obtaining the statement "irrespective of the erratic behavior displayed

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United States v. Fayer, 523 F.2d 661 (2d Cir. 1975); People v. Kennelly, 648 P.2d 1065, 1066 (Colo. 1982). No such conduct was found by the district court here.

[52] Hearing of June 30, 1983 (Allis), J.A. 946-47, 966-67.

by Janowski during his visit on December 27." There was indeed ample testimony that Janowski was a flamboyant personality, that Allis believed she might have been emotionally unstable, and that, according to evidence later adduced, she had a history of mental instability and other problems. Yet we cannot find anything in Janowski's behavior that day that should have made it clear to Allis either that she did not understand what she was saying about Barnes' conduct and about the *Koller* case, or that what she was saying was untrue. Nor do we understand the court's cryptic reference to Janowski's "erratic behavior" as a finding to the contrary. Under these circumstances, Allis cannot be said to have acted improperly in getting a statement from Janowski affirming the gist of what she had already twice reported to him orally.

Counsel for the defendant does not even argue that Allis knew or that it was obvious that Janowski's critical claim—that she was under pressure from the defendant to sign a false statement that Koller had admitted not taking Bendectin during the first trimester—was false or [41] that the case was a fraud. In oral argument defense counsel conceded that, given what Allis knew on December 27, it was proper, and perhaps even required by his duty to the Kollers, for him to visit Janowski and probably to take some kind of statement. Counsel claims, however, that Allis crossed the permissible line by including two "self-serving" statements that went beyond what Janowski had already told him and that were untrue: the statements that "my [*i.e.*, Janowski's] mind is free and clear," and that Janowski was receiving no remuneration in exchange for the statement.

Although the court did not mention the "free and clear" passage, the district court's criticism of "Allis' procurement of the statement irrespective of the erratic behavior displayed by Janowski" could arguably be read as implying a finding that the "free and clear" passage was inaccurate. Counsel for the defendant argues that the statement that "my mind is free and clear" was an "indisputable falsehood." Brief for Appellee at 45. We do not, however, view it thus in the confusing context of that eventful day. The statement appears to us to resemble the simple affirmation of mental clarity routinely inserted in wills, affidavits and other documents, and cannot be said to be palpably false or misleading unless Allis "knew or it was obvious" that Janowski did not understand what she was saying, that she signed the statement under duress, or that other assertions in the substance of the statement were untrue. The district court's opinion does not come close to making any such finding, and the evidence supports Allis' characterization of Janowski's behavior as, at most, "almost inappropriately calm," relaxed and chatty that evening.[53]

The defendant points to another specific passage from the Janowski statement as an "indisputable falsehood": the statement that "I have been promised no remunera-[42]tion of any kind by any representative of Butler, Jefferson, Dan & Allis for stating these true statements or for anything else." The defendant argues that this statement is false because "[a]fter the statement was signed (but before it was transmitted to the District Court), Allis agreed that a typewriter would be delivered to Ms. Jan-

[53] Hearing of Mar. 15, 1983 (Allis), J.A. 809-10.

owski's apartment so that she could stay on the Butler firm's payroll without coming into the office." In addition, defendant points to an arrangement by which Janowski's roommate "would pick up salary and vacation checks for her on Friday, December 31, 1982." Brief for Appellee at 45.

The district court, however, made no reference whatsoever in its opinion to the statement about "remuneration," nor did it make any other "finding" that could be interpreted as support for the defendant's argument on this point. As of December 27, 1982, Janowski was still an employee of the Butler firm and had recently given birth to a premature baby which was occuping much of her time. Furthermore, it is undisputed that she told Allis that she was under pressure from defendant to sign a false statement that her employer's case was a fraud. We therefore reject the defendant's contention that keeping her on the payroll temporarily in order to accommodate her role as an employee with the emotional pressures of her personal situation, and even paying her wages and fringes that were due to her for past service,[54] con-[43]stituted "remuneration" for making the December 27 statement. Indeed, two expert witnesses on legal ethics testified that, given the growing suspicion that Janowski

[54] In arguing that the paycheck was "remuneration" beyond what was due to Janowski, defense counsel makes much of the fact that she had performed virtually no work during the pay period. Not only did the pay period extend over the Christmas and New Year's holidays, but there is also uncontradicted testimony that the firm was rather liberal in permitting employees personal time off—time not counted against vacation pay—while continuing to pay their regular salary. Janowski herself had been given several days off months earlier when her brother was injuried. Hearing of June 30, 1983 (Allis), J.A. 949-50.

may have actually contacted opposing counsel, though perhaps only on Barnes' suggestion, Allis "probably hit on the ideal way" to handle the situation.[55] The arrangement legitimately kept her on the payroll, at least temporarily, while keeping her out of the office. We cannot accept defense counsel's condemnation of Allis' failure to fire Janowski immediately before even sorting out what had happened.

Finally, we do not find any impropriety in Allis' recording of the December 27 conversation. There is authority for the proposition that surreptitious recording generally is unethical,[56] and this court does not sanction the practice. Counsel, the client and the witness are ordinarily best protected if counsel advises the witness that the conversation is being recorded and obtains permission for the use of that recording. While Allis did not follow that procedure in this case, given the expert testimony that the use of a secret recording was proper under the peculiar circumstances Allis faced,[57] and given the questionable credibility of the individual being recorded, Allis' actions in taping his conversation with Janowski can more easily be understood to reflect a desire to get at the truth and to protect the interest of his client rather than to "thwart a true investigation." On the whole, we con-

[55] Hearing of June 30, 1983 (Lumbard), J.A. 1039. *See also id.* (Austern), J.A. 996.

[56] *See, e.g.*, ABA Comm'n on Ethics and Professional Responsibility, Formal Op. 337 (1974); N.Y. Bar Ass'n Comm. on Professional Ethics, Op. 328 (1974). These and other bar opinions on the ethics of surreptitious recording appear at J.A. 248-68.

[57] *See* Hearing of June 30, 1983 (Austern), J.A. 1017-18; *id.* (Lumbard), J.A. 1030-32.

clude that Allis' actions throughout the Janowski episode [44] did not constitute misconduct and do not justify his disqualification from further representation of plaintiffs.[58]

3. *The Nature of the Proceedings*

We also feel compelled to express our misgivings with the scope of the district court's inquiry into Allis' conduct; it was at once too broad and too narrow. At the outset, the court interpreted the Butler firm's limited waiver of the attorney-client privilege as to any conversations between Janowski and Mrs. Koller to extend to any discussions concerning when Mrs. Koller took Bendectin, including discussions within the firm, between the firm and other plaintiffs' counsel, and between the Kollers and their lawyers. As a result, we and the defendant are privy to the minute details of innumerable strategy meetings, telephone calls, and other conversations concerning one of the two key factual issues in the *Koller* case. While the court stated that it would "not tolerate a fishing expedition into the strategies of plaintiffs' attorneys in this litigation," Memorandum Opinion of Jan. 19, 1983, J.A. 139, the early stages of the inquiry seem to have come close to just that.

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[58] We express no view as to the proper resolution of any problems that could arise in future proceedings if Janowski appears as a witness for the defendant and plaintiffs seek to impeach her testimony. *Cf.* Rosen v. NLRB, No. 83-1226, slip op. at 18-22 (D.C. Cir. May 18, 1984) (where testimony as to attorney's conduct at prior meeting was critical evidence undermining client's position, attorney should have withdrawn to testify as to meeting). Although we do not foreclose the pretrial inquiry that the concurring judge would mandate neither do we believe it is our function to take up this issue *sua sponte*, speculate on possible future scenerios in which the problem could arise, and instruct the district court as to how to deal with it.

The court's primary justification for permitting this massive intrusion into the attorney-client and work-product privileges was the exception for fraud. *Id.*, J.A. 141. Even if this exception could support such a sweeping abrogation of the privileges at issue, it should not have been applied in this case without first ascertaining whether there was any credible evidence that Mrs. Koller had indeed admitted to Janowski not taking Bendectin [45] during the critical period. Without credible evidence of such a conversation—the only new "evidence" before the court—there would seem to be no basis for the extraordinarily detailed inquiry launched in January into the plaintiffs' evidence on this crucial issue in the case-in-chief. Yet the court stated in its January 19 ruling only that it could not find Janowski's charge to be "frivolous or manufactured at this time." *Id.* For the purpose of the evidentiary hearings into the episode, the court viewed as irrelevant the question of whether such a conversation ever took place, and the credibility of Janowski in general.[59] Indeed, at this point not even defense counsel is willing to endorse Janowski's credibility.

The extensive and detailed nature of the court's inquiry into possible improprieties of plaintiffs' counsel is especially confounding in light of the court's refusal to entertain any substantial inquiry into possible improprieties by defense counsel. This limitation on the inquiry cannot be explained

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[59] It is not clear to us why it was necessary, once the court had concluded that Janowski's testimony as to any conversation with Mrs. Koller was simply evidence for the jury to consider, *see supra* note 29, to hold immediate evidentiary hearings on the propriety of Allis' conduct several months earlier. These proceedings and the court's subsequent deliberations appear to have been primarily responsible for over a year's delay in the trial of this action.

simply by the pendency of a defense motion to disqualify plaintiffs' counsel, since the court stressed that the inquiry was as much on the court's own initiative as at the behest of the defense.[60]

There was evidence, some undisputed, that defense counsel had engaged in discussions about a case with a confidential secretary for opposing counsel without [46] her employer's knowledge, had made *ex parte* contact with the court's law clerk on December 23, touching on at least some matters of substance,[61] had on its own obtained "independent counsel" for Janowski,[62] and was paying substantial sums of money to provide Janowski not only with counsel, but also with a comfortable apartment and other financial needs for her and her child. We are certainly in no position to ascertain whether any of these activities constituted misconduct by defense counsel. But we are left with some bewilderment over the court's one-sided approach to a peculiar episode that drew counsel on both sides into very murky waters.

C. *The Episode Involving Butler*

The district court found that Butler's "release of the DERs to the media was calculated to prejudice the de-

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[60] *See* Hearing of Mar. 27, 1983, J.A. 639-2.

[61] *See supra* pp. 9-10. Defense counsel asserts that the December 23 telephone call was solely for the purpose of attempting to set up a meeting with the court as soon as possible.

[62] Defense counsel contends that Schuck is a reputable attorney not personally known to them and that he has complete independence in his representation of Janowski. Plaintiffs dispute Schuck's independence, in light of the source of his fee and his firm's representation of other drug companies involved in litigation, including birth defect litigation, in which the Butler firm is opposing counsel. Affidavit of Butler, Jan. 5, 1983, J.A. 283.

fendant's case and circumvent the Court's prior rulings," citing in particular "Butler's refusal of the Court's suggestion that he explain his actions during the hearings." Opinion at 8, J.A. 240. We read the court's opinion not as a *per se* condemnation of Butler's communication to the press of information relevant to the case; rather the court appears to have been primarily concerned with the peculiar timing and placement of the release of information so as to maximize the likelihood of potential jurors seeing it. Nevertheless, we cannot uphold the court's order disqualifying Butler for his actions. [47]

Initially, we have some question as to the basis for the court's finding that Butler's intent was to "prejudice the defendant's case" and circumvent the court's evidentiary rulings. The court heard no live testimony on this issue; in particular it heard no testimony contradicting a plausible explanation contained in Butler's affidavit for the timing of the release—that he had not received the parents' authorizations to release the information until January. We do not believe that the court could reasonably conclude from Butler's failure to testify voluntarily that he was lying in his affidavits as to his motivation. In light of this explanation, together with Butler's amply demonstrated concern over the safety of Bendectin, the peculiar timing of Butler's release of information does not provide unambiguous support for the court's finding of bad intent.

In any event, the circumstantial evidence of Butler's intent is not dispositive; we must also look at what Butler did. The court's order treats Butler's disclosure of information ruled inadmissible in a series of routine pretrial evidentiary rulings as the equivalent of his violation of a direct prohibition on dissemination of information to the public. If

Butler had released the information in the face of a protective order barring public disclosure of the DERs, we would be facing a more acute conflict between the integrity of the court's orders and the constitutional issues raised by direct restraints on the free flow of information about matters of public concern.[63] But the [48] court issued no such order. We cannot view Butler's release to the public of information ruled inadmissible at trial as anywhere near equivalent to a violation of a court order prohibiting such conduct.

Nor is Butler's conduct covered by traditional bans against bringing inadmissible evidence directly to the attention of the jury, either inside or outside the courtroom. Thus, provisions proscribing the reference at trial to material ruled inadmissible, *see* DR 7-108(A), (B)(1), and those prohibiting direct extrajudicial communication with jurors, *see* DR 7-106(C)(1), (C)(7), are clearly inapt. Defendant invokes a "fundamental principle familiar to

[63] *See* CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975) (vacating order prohibiting counsel, parties, friends and relatives from discussing case with press). We note that protective orders will more readily pass constitutional muster in the very distinct context of information obtained through civil discovery. *See* Seattle Times Co. v. Rheinhart, —— U.S. ——, 52 U.S.L.W. 4612 (May 21, 1984); *cf.* In re San Juan Star Co., 662 F.2d 108 (1st Cir. 1981) (upholding order found to be "least restrictive means" possible under extreme circumstances of case). As far as we can tell, none of the information released by Butler was obtained through discovery.

The public importance of many issues involved in civil litigation is frequently cited as a reason for limiting the application of restrictions on press commentary by attorneys in civil cases. *See, e.g.*, In re Halkin, 598 F.2d 176, 187 (D.C. Cir. 1979); Hirschkop v. Sneed, 594 F.2d 356, 373 (4th Cir. 1979); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 258 (7th Cir. 1975), *cert. denied sub nom.* Cunningham v. Chicago Council of Lawyers, 427 U.S. 912 (1976).

every trial lawyer [that] when the Court has ruled that evidence is inadmissible, counsel has a legal and ethical obligation to refrain from circumventing the Court's ruling by using circuitous means to place the evidence before the jury." *See* Brief for Appellee at 59. But the cases cited in support of the principle involve reference in final arguments to inadmissible evidence, and are thus similarly inapt.[64]

The defendant argues that Butler has violated the section of the District of Columbia Code of Professional Responsibility that deals directly with press comments by counsel in civil matters, a provision not, however, mentioned by the court. The District of Columbia Court of Appeals on February 14, 1975, amended the Code to [49] eliminate the direct prohibitions on extrajudicial statements contained in DR 7-107(G) and (H). The court instead substituted Canon 20 of the American Bar Association Canons of Professional Ethics, which reads as follows:

> Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally, they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond question from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

The deliberate substitution of this general and largely precatory language for the detailed restrictions of DR 7-107

[64] *See* Garris v. United States, 390 F.2d 862, 865 (D.C. Cir. 1968); Reichert v. United States, 359 F.2d 278, 282 (D.C. Cir. 1966).

(G) and (H) of the Code may well reflect serious reservations about the wisdom and even the constitutionality of the latter.[65] The Legal Ethics Committee of the District of Columbia Bar has emphasized with respect to the current D.C. version of DR 7-107(H) that it "would hesitate to interpret the Code of Professional Responsibility or the Canons of Profesional Ethics in such a way as to thwart the communication of accurate factual information regarding legal proceedings to the press in the absence of *a substantial threat to the due administration of justice.*" Formal Op. 8 (1975) (emphasis added).[66] [50]

The Legal Ethics Committee's opinion highlights a critical element in the proper interpretation of the Code's admonition against press statements by lawyers about civil litigation—an element that is missing in this case. The court found no "substantial threat to the due administration of justice," but based its order entirely on Butler's purported intent to circumvent its ruling and prejudice the defendant's case by releasing the information. In this case, the resulting article was far from inflammatory, and gave substantial space to those, including defendant, who disputed Butler's assessmennt of the teratogenic qualities of Bendectin. Indeed, the article quotes defendant's position on the com-

[65] Two courts of appeal have struck down the ABA rules prohibiting public comment by lawyers in civil cases as unconstitutional restraints on attorney speech. *See* Hirschkop v. Sneed, 594 F.2d at 373; Chicago Counsel of Lawyers v. Bauer, 522 F.2d at 257-59.

[66] The Fourth Circuit in *Hirschkop*, in reviewing the background of ABA DR 7-107, had occasion to comment on its predecessor, ABA Canon 20, the text of which has been adopted as the current D.C. version of DR 7-107(H). The court commented as to Canon 20 that "as long as the standards were so general and unspecific, and in the presence of First Amendment rights, punishment should be meted out only to the most flagrant offenders." 594 F.2d at 365.

pletely independent issue of when Mrs. Koller took Bendectin—an issue of no public importance outside of the *Koller* case itself. The court properly observed that the conduct of Mintz was not before it,[67] but the focus on Butler's conduct alone should not have precluded any inquiry into the actual effect of his conduct on the likelihood of a fair trial. Apart from the balanced nature of the article, the prospect of prejudice was further diminished by the fact that the information was released before jurors were assigned to a particular case and thus alert[ed] to the nature of the issues they would decide.[68] We have no basis for believing that voir dire, a process designed in part to protect against prejudicial publicity, would be inadequate to discover and remove any jurors influenced by the Mintz article.[69] [51]

The defendant relies heavily on *State* v. *Kavanaugh*, 52 N.J. 7, 243 A.2d 225, *cert. denied sub nom. Matzner* v. *New Jersey*, 393 U.S. 924 (1968), in which the court revoked the *pro hac vice* appearance of criminal defense counsel, F. Lee Bailey. Whether or not we were to find *Kavanaugh* to be persuasive authority, its facts are radically different from those before us. In that case, Bailey sent out over 150 letters to public officials, not surprisingly leaked to the press, protesting the exclusion of lie detector evidence

[67] Hearing of Feb. 17, 1983, J.A. 615-18.

[68] This would be a different case if Butler had released the information in the middle of trial when jurors would be highly alert to any articles about Bendectin and birth defects.

[69] Several courts have pointed out that the danger of jury prejudice due to publicity is much less in civil than in criminal cases and can generally be alleviated without broad prohibitions on press commentary by lawyers. *See, e.g.*, In re Halkin, 598 F.2d at 192-93; Hirschkop v. Sneed, 594 F.2d at 373; Chicago Council of Lawyers v. Bauer, 522 F.2d at 257-58.

favorable to his client, attacking as utterly corrupt the entire conduct of the proceeding, and calling for executive intervention to halt the prosecution. Even in the face of such extreme statements by counsel, the court in *Kavanaugh*, unlike the district court here, revoked Bailey's appearance only after reluctantly concluding that there was no evidence that "Bailey would stay in bounds" in the future, and that subsequent disciplinary proceedings would be inadequate to protect the integrity of the judicial process. 243 A.2d at 231.

This case is very different. While Butler's decision to release the DERs to the press precisely when he did is not to be applauded, we do not believe that he could properly be found to have violated the language of the D.C. Code of Professional Responsibility. At least in the absence of clear evidence of a substantial threat to a fair trial for defendants, we cannot approve his disqualification, with the attendant prejudice to his clients, on the basis of this episode.

IV. Conclusion

We conclude that the district court applied an erroneous legal standard in evaluating whether Allis and Butler had engaged in misconduct warranting revocation of [52] their *pro hac vice* appearances. Viewed under the appropriate standards, the conduct of neither Allis nor Butler justifies the court's order revoking their appearances and disqualifying their law firm. We therefore reverse the decision of the district court and remand for reinstatement of the appearances of Allis and Butler on behalf of plaintiffs.

The plaintiffs have requested that we direct the district court to assign this case to another judge for future proceedings. *See* Brief for Appellants at 57. We recognize that these disqualification proceedings, culminating in what we have determined to be erroneous findings of misconduct against plaintiffs' counsel, have sorely tried the relationship between the court and plaintiffs' counsel. If the district court judge believes that it will be difficult after these events for her to act with complete impartiality in future proceedings vis-a-vis Allis and Butler, we are confident that she will recuse herself. Otherwise we decline to prejudge her ability to preside with equanimity over a fair trial on the merits of the Kollers' claims. We add only a few words about the disciplinary proceedings reviewed here.

In December, 1982, when this episode began, trial was scheduled to begin within weeks. Trial has still not begun. In the course of these disqualification proceedings, the court and counsel have probed the inner workings of the plaintiffs' counsel's law firms, shattering counsel's work-product privilege and plaintiffs' attorney-client privilege. The inquiry shifted focus several times, appearing at one point to be an investigation of the plaintiffs and of one of the core issues in their lawsuit, at another time of the bizarre activities and motives of the "double agent" informer, and finally of plaintiffs' counsel.

The disruption and delay of proceedings on the merits, such as we have seen in this case, are unhappily foreseeable byproducts of the injudicious use of disqualification motions by opposing counsel. We fear the intrusive [53] potential of such motions would be exacerbated were orders disqualifying counsel not immediately appealable. In complex, costly product liability cases of this type, the plaintiff may have no realistic or comparable alternative to current counsel; counsel are not fungible. To the degree that the credibility

of potential witnesses such as was involved in this case can and will be tested in the course of the case in chief, there is little justification for a protracted preview of the evidence through disqualification proceedings. As for questionable activities on the part of trial counsel, at least where those activities do not clearly violate a disciplinary rule and taint future proceedings, they should be remediable by admonitions, protective orders, or even, if necessary, by post-trial contempt without needlessly delaying proceedings on the merits and depriving a party of its chosen counsel.[70] We hope that the profoundly disturbing episode chronicled in this case serves to make trial courts and counsel aware of the importance of not allowing dubious and exaggerated attacks on counsel to derail civil proceedings.

Reversed and remanded.

[70] As we explain *supra* pp. 33-35, in some situations—especially conflicts of interest or likely appearance by counsel as a witness—continued representation by counsel may taint future proceedings; in those cases a pretrial inquiry and possibly disqualification may be necessary.

Concurring Opinion in the Court of Appeals

[1]

RICHEY, J. (concurring): With some reservation, I reluctantly concur in Judge Wald's opinion but am now writing to clarify my differences with the majority without in any way intending to reflect adversely upon my two colleagues or the sincerity of their views. I am just compelled to express my views separately on two issues of crucial importance in this and future cases. I address them *seriatim*.

THE TRIAL JUDGE SHOULD BE DIRECTED TO CONDUCT A PROMPT HEARING PRIOR TO TRIAL BECAUSE IT MAY BE NECESSARY FOR COUNSEL TO APPEAR AS A WITNESS

One of the crucial factual issues to be decided at the trial of this case will be whether Mrs. Koller actually took Bendectin during the critical period; that is, during the first trimester of her pregnancy. The importance of this issue is evidenced by the zealous efforts of counsel for all parties to obtain statements and/or retractions from Janowski, who claimed that Koller had admitted not taking the drug during the critical period. Unfortunately, however, zealous efforts can often lead to the possibility that a lawyer will be called as a witness. In this case, given the active role that counsel for both sides have taken in gaining statements from Janowski, and given the apparent inconsistency of some of those statements, there is a strong possibility that a lawyer from either side, or both, will be called to testify. The lawyers may have to testify concerning their actions in communicating with Janowski or other matters, or even to impeach her credibility. When the potential for unfair surprise and prejudice to either side is so great, it is the

responsibility of this Court to *sua sponte* raise the issue and give the trial court specific direction on how to resolve the problem.

The public interest demands an efficient use of judicial resources towards the "just, speedy and inexpensive" [2] remedy spoken for in Rule 1 of the Federal Rules of Civil Procedure. Towards that end, "courts should *sua sponte* raise ethical problems involving danger to a just, speedy and inexpensive remedy, even if the parties do not." *General Mill Supply Co. v. SCA Services, Inc.*, 697 F.2d 704, 711-12 (6th Cir. 1982); *Moyer v. 1300 Nineteenth Street Corp.*, —— F. Supp. —— (D.D.C. May 14, 1984). Here the danger is a large probability. Defense counsel may choose to call Allis to try and show that he obtained the retraction from Janowski in a misleading or unfair manner. Plaintiff's counsel may decide to call a member of the defense law firm to try and show that Janowski's original claim that Koller was not telling the truth, was induced by financial or other incentives or threats. In addition, there exists the potential that a lawyer on either side will need to be called to support their own client's position. For example, Allis may need to testify concerning what Janowski told him during his visit to obtain the retraction.

Attorneys appearing before this Court and the District Court are governed by the Code of Professional Responsibility adopted by the District of Columbia Court of Appeals. Local Rule 4-3(IV)(b). DR 5-102(A) provides that a "lawyer . . . shall withdraw from the conduct of the trial and his firm, if any, shall not continue in the representation in the trial" if he knows or it is obvious that he ought to be called as a witness on his client's behalf. In addition, DR 5-102(B) provides that when "a lawyer learns or it

is obvious that he . . . may be called as a witness other than on behalf of his client" he may continue representation only until it is apparent that his testimony may be prejudicial to his client. Ethical Consideration 5-9 notes that "[t]he roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state the facts objectively." In such situations where the lawyer is called to testify, as this Court has recognized, the "case [3] would be presented through the testimony of an obviously interested witness who is subject to impeachment on that account . . .". *Groper v. Taff*, 717 F.2d 1415, 1418 (D.C. Cir. 1983). As such, the lawyer is put "in the unseemly position of arguing his own credibility". *Id.* When an attorney is forced to argue his own credibility, the effects are disastrous. Such testimony has high prejudicial impact which is unlikely to be outweighed by its probative value. Fed. R. Evid. 403. The magnitude of the problem is ably discussed in *General Mill Supply Co. v. SCA Supply Services, Inc.*, 697 F.2d 704, 712 (6th Cir. 1982):

> The experience of the bar and its collective voice in the ABA Canons demands the separation of the roles of advocate and witness. Experience shows that one who combines both roles is not likely to be, as an officer of the court, helpful to the court. There is always danger that when he speaks he will forget whether he speaks as advocate or counsel, to the likely confusion of proceedings, as well as their embitterment. Experience teaches that embitterment between counsel does not conduce to just and speedy proceedings. Such embitterment is likely to occur when one counsel undertakes to impeach the credibility of opposing counsel in his capacity of witness.

See also Moyer v. *1330 Nineteenth Street Corp.*, —— F. Supp. —— (D.D.C. May 14, 1984).

Although the parties have not raised this issue in their pleadings or in oral argument, as previously stated, in such a case where the potential for conflict is so strong, I believe that the duty of this Court is no less than the trial judge to see that the matter is ventilated at the earliest practicable moment *prior to trial.* While it is not the role of this Court at this stage to make factual or legal determinations on this issue, I would advocate the exercise of this Court's inherent power as supervisor of the administration of justice in remanding the case to give specific instructions to hold a pre-trial hearing on [4] this issue. Counsel for both sides have peculiar knowledge that relates to crucial facts in dispute in this case. In order to avoid the possibility of a mistrial and a waste of judicial resources that could result if this issue is not resolved prior to trial, the trial judge should make prompt inquiry into this matter by holding a hearing without delay upon remand.

The importance of avoiding problems by conscientious and thorough pre-trial proceedings by the trial judge is reflected in the recent amendments to Fed. R. Civ. P. 16, effective August 1, 1983. Rule 16 now provides for greater judicial management of cases prior to the start of trial in order to see that the case is "disposed of . . . more efficiently and with less cost and delay. . . ." Advisory Committee Note to 1983 Amendment. The rule specifically calls for the *trial* court judge, in the exercise of his or her discretion, to hold a pre-trial conference where many subjects may be discussed, including "such other matters as may aid in the disposition of the action." Fed. R. Civ. P. 16(c)(11). The

importance of pre-trial procedures is also evidenced by the words of Judge Laws, the late Chief Judge of the United States District Court for the District of Columbia:

> One of the vital, if not outstanding, advantages of pretrial procedure is to take the trial cases out of the realm of surprise and maneuvering, whereby an unwary counsel might see the just case of his client lost.

Laws, *Pre-Trial Procedure,* 1 F.R.D. 397, 399 (1940).

In the case before the Court today, if the trial judge were not to make prompt and efficient inquiry on remand, the potential for unfair surprise is great. In addition, if unresolved problems arise at trial for the first time, the potential for incurable prejudice, resulting in a mistrial, is quite high. Absent comprehensive pretrial procedures, trial judges may be forced to hold complex hearings on issues unrelated to the merits of an action *in the middle of trial.* It would indeed be unfortunate [5] if the trial judge in this case on remand, were forced to hold a hearing on this crucial ethical question and voir dire the witnesses and lawyers in the middle of trial. Such action would result in undue delay of the trial, added expense to the witnesses, counsel and the parties, and added uncomfort and anxiety to a jury panel that will have to sit and wait while these issues are ironed out. This result would be inconsistent with the duty of the trial court to conduct the trial in the most economical and efficient manner. *See* Fed. R. Civ. P. 1, 16.

The first question the trial judge must resolve is whether counsel intend to call their legal adversaries as witnesses or whether the lawyers should testify on their respective clients'

behalf. If counsel represent that such situations will not occur, that may end the matter. If counsel represent, however, that the potential does exist, the trial judge should immediately convene a hearing to address the issues and make appropriate findings with respect to this matter. Judge Wald seems to suggest that ethical violations, and perhaps other matters should be dealt with by "admonitions, protective orders, or even, if necessary, by post-trial contempt orders without needlessly delaying proceedings on the merits." Such advice in this instance, however, appears to ignore the obvious practical problems that a trial judge faces when trying a case. The question remains "how does a judge try a case most effectively and fairly to all parties involved?". The answer lies in thorough and comprehensive pre-trial procedures that resolve in advance, all of the problems that may be reasonably anticipated or expected to arise at the trial. This is the purpose of Motions in Limine and Fed. R. Civ. P. 16. By promptly resolving such problems, the trial court will be securing the highest quality of justice, in the least amout of time, and at the lowest possible cost to the parties. [6]

Even the Suggestion of Remanding This Case to Another Judge Is Inappropriate

My second concern with Judge Wald's opinion stems from the implicit allegations made against the trial judge in this case concerning her alleged "one-sided approach" to the case. After a thorough review of the record, I can conclude no more than that she has erred in disqualifying Allis and Butler on the grounds set forth in the majority opinion. I cannot join in such direct or indirect criticism of the competence and fairness of the trial judge. I concur, wholeheartedly, however, with this panel's de-

cision not to directly remand the case to another judge and desire to express my views more fully because of the potential for havoc such a remand policy would generate upon the effective administration of justice in the trial court.

While appellate courts do have authority to reassign cases on remand "to avoid even the appearance of bias," *see Calvaresi* v. *United States*, 348 U.S. 961 (1955); *Lewis* v. *Curtis*, 671 F.2d 779, 789 (3d Cir. 1982), *cert. denied*, 103 S.Ct. 176 (1982), "such mandatory reassignments should be made infrequently and with the greatest reluctance." *Nobel* v. *Morchesky*, 697 F.2d 97, 103 n. 11 (3d Cir. 1982). "Remand to a different judge is not the usual remedy when error is found in District Court proceedings. Remand to a new judge is reserved for unusual circumstances." *United States* v. *Arnett*, 628 F.2d 1162, 1165 (9th Cir. 1979); *see also United States* v. *Medina-Cervantes*, 690 F.2d 715, 717 (9th Cir. 1982). Without specific and objective evidence that a trial judge, acting in his or her judicial capacity, will be unable to fairly follow the mandates of this Court and apply them in a fair and impartial manner, a remand to another judge, or a direct or indirect suggestion for such action is totally inappropriate in my view. Some courts have declined to remand cases to another judge on the implicit rationale that judges are presumed to be able to act [7] fairly. *See e.g., Spivey* v. *Zant*, 683 F.2d 881, 886 (5th Cir. 1982) ("We are confident that the District Judge . . . is capable of according Spivey the fair hearing to which he is entitled."); *Zweibon* v. *Mitchell*, 606 F.2d 1172, 1182 n. 57 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (1981), *rehearing denied*, 453 U.S. 928 (1981). Cer-

tainly, based upon the record, such is the case here. To hold otherwise is to engage in sheer speculation, conjecture and surmise which would be improper.

In *Zweibon* v. *Mitchell*, 606 F.2d at 1182 n. 57, this Court recognized that a trial judge should be deemed capable of carrying out his or her judicial obligations:

> We decline appellant's invitation to assign this case to a different judge on remand. We are confident that the District Judge will follow this court's rulings and will faithfully discharge his judicial obligations.

Even when this Court has found that a trial judge was "disposed against" a party's claim, it declined to mandate reassignment to another judge. The Court left that decision to the discretion of the District Court under its rules, and the presumption that the trial judge would recuse himself if grounds for such an action existed. *See United States* v. *Barnes*, 662 F.2d 777, 783 (D.C. Cir. 1980).

The situations in which reassignment has been mandated by this Court are very distinguishable from the case at bar. In *Naples* v. *United States*, 307 F.2d 618 (D.C. Cir. 1962) (en banc), a case was remanded to a different judge when there existed an "unmistakable" conclusion that the trial judge's opinion largely reflected the "personal views of the author", the judge had not cited the relevant precedent in the Circuit, and when the judge re-appointed counsel for a defendant when the lawyer refused to pursue a procedural course of action suggested by the judge. *Id.* at 629-30. Even in that case, [8]

however, three judges wrote separately to disagree with the decision to remand the case to a different judge. The late Circuit Judge Bastian wrote:

> Our principal purpose here is to dissociate ourselves from the ruling of the majority that, upon remand, the case must be tried before a different judge. We consider this a reflection on a distinguished member of the District Court whose ability and integrity are well known. We think a reading of the judge's opinion indicates the meticulous care and attention which he gave to this case. There is no reason to believe that the District Judge would not follow the rules laid down by this court in its majority opinion.

Id. at 631-32. In *Bishop* v. *United States*, 349 F.2d 220 (D.C. Cir. 1965), *cert. denied*, 393 U.S. 870 (1968), a remand to another judge was found to be appropriate when the trial judge had shown "such disregard" for procedures designed to test the validity of a criminal plea, that an "impartial inquiry" was needed. *Id.* at 221.

In the case before the Court today, I can find no actions by the trial court judge that rise to such a level justifying a remand to another judge. Her opinion and comments during hearings represent fair comment on the evidence introduced before her in open court which the standardized jury instructions for the District Court assert is appropriate and proper. *See* Standardized Civil Jury Instruction for the District of Columbia, No. 1-6 (1981). Counsel for appellants in this case seek to "end-run" the tough standards for recusal of judges mandated by Congress in 28 U.S.C. §§ 144 and 455. Such statutes are consistently construed strictly to safeguard the judi-

ciary from frivolous and unwarranted attacks upon its dignity and integrity, to prevent abuse and to insure the orderly functioning of the judicial system. *See e.g., Rademacher* v. *City of Phoenix*, 442 F. Supp. 27, 29 (D. Ariz. 1977); *Town of East Haven* v. *Eastern Airlines, Inc.*, 304 F. Supp. 1223 (D. Conn. 1969). In addition, the [9] law is clear that bias and prejudice acquired by the Court *in its judicial capacity*, or indicated by in-court comments prompted by developments in the case or prior legal proceedings, cannot be the basis for recusal. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); *In re International Business Machines Corp.*, 618 F.2d 923, 929 (2d Cir. 1980) (Bias must be extrajudicial and not based upon in-court rulings.); *United States* v. *Haldeman*, 559 F.2d 31, 133 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 955 (1977); *United States* v. *Patrick*, 542 F.2d 381, 390 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); *Wolfson* v. *Palmieri*, 396 F.2d 121, 124 (2d Cir. 1968). Counsel for appellants have not shown any facts raising a colorable claim that the trial judge should have recused herself and did not raise this issue on appeal. There is simply no evidence that the experienced trial judge in this case will be unable to continue to preside over the trial, on remand, with her usual competence, impartiality and good judgment based upon her outstanding record of thirteen years of trial judge experience and her experience in the Corporation Counsel's Office and the Department of Justice. Based upon long experience as a litigator and as a trial judge, I cannot sanction the use of requests to remand appellate cases to different judges. The time has come to implement the mandate of Congress and remand cases to a different trial judge *only* on the basis of evi-

dence that would require recusal under 28 U.S.C. §§ 144 and 455. Otherwise, we will be opening a "Pandora's Box" for countless baseless attacks upon a defenseless judiciary whose independence is essential to the preservation of this republic.

To encourage requests for remands to another judge, would also be encouraging indirect judge shopping, and libelous or slanderous statements directed against *both* trial and appellate judges. In addition, remands by an appellate court to different judges cause a waste of valuable judicial resources particularly in a case such as this [10] where the trial judge has become familiar with the facts and issues of a case. This factor has been considered by a number of courts and is particularly relevant when the case is a complex one. *See United States* v. *Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (en banc); *United States* v. *Medina-Cervantes*, 690 F.2d 715, 717 (9th Cir. 1982). Such a remand by an appellate court is also an unnecessary disparagement of the trial judge's reputation at the bar and may even contribute to the loss of collegiality and her effectiveness. For these reasons, I agree with my colleagues' decision not to accept appellant's suggestion to remand to another judge but would omit any implicit suggestion of the possibility of recusal. Such suggestions will only encourage requests for a remand to a different judge on frivolous grounds in the future. The Court's function is to discourage such a practice except in the most egregious case.

Amendments to the Opinion of the Court of Appeals Dated July 16, 1984

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 80-01258

Filed Jul 16 1984

GEORGE A. FISHER
Clerk

No. 84-5039

Anne Elisabeth Koller, et al.
James G. Butler, et al.,

Appellants

v.

Richardson-Merrell, Inc., A Delaware Corporation

BEFORE:

WALD and MIKVA, Circuit Judges, and RICHEY*, District Judge, United States District Court for the District of Columbia

ORDER

It is ORDERED by the Court, *sua sponte*, that the Opinion of the Court filed on May 29, 1984, is amended as follows:

Page 50, after line 8, add the following sentence:

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* Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

Amendments to the Opinion of the Court of Appeals

> We need not decide, however, if Canon 20 requires such a showing in all cases or for all disciplinary purposes,[67] for we have already determined that disqualification is appropriate in cases of this kind only if the misconduct at issue is "likely to infect future proceedings." *See supra* p. 35.

Add new footnote 67:

> Nor, of couse, do we purport to determine the manner in which the local Legal Ethics Committee should interpret the phrase "substantial threat to the due administration of justice."

All subsequent footnotes (67-70) should thus be renumbered.

Page 51, ¶ 2, lines 3-7: delete

> "he could properly be found . . . to a fair trial for defendants"

and insert in its place

> "This record could support a finding that his conduct was likely to infect future proceedings. Under these circumstances,"

Per Curiam
For the Court:

GEORGE A. FISHER, Clerk

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Opinion of the District Court
Dated January 6, 1984

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 80-1258

FILED
JAN 6 1984
Clerk, U.S. District Court
District of Columbia

ANNE ELISABETH KOLLER, *et al.*,

Plaintiffs,

v.

RICHARDSON-MERRELL, INC.,

Defendant.

MEMORANDUM OPINION

This matter is before the Court on the motion of defendant to impose sanctions on plaintiffs' counsel for certain alleged misconduct. The major incidents under consideration are 1) Nicholas Allis' preparation and procurement of a statement from Krystyna Janowski retracting her previous statement to defendant that this case is fraudulent and 2) James Butler's release of fourteen drug experience reports (DERs) and other information regarding defendant's manufacture of the drugs Thalidomide, MER-29, and Bendectin to the *Washington Post* (Post) and other representatives of the media.* On February 27, 1983, the Court

* Defendant alleges several other incidents of alleged misconduct by plaintiffs' counsel, however, the Court need not reach these issues.

Opinion of the District Court

heard oral argument on this matter, and an evidentiary hearing was held in March. Thereafter, the Court ordered plaintiffs' counsel to show cause why James Butler, Nicholas Allis, and the firm of Butler, Jefferson, Dan & Allis (Butler firm) should not be disqualified from further representation of plaintiffs. Pursuant to that Order, further hearings were held. After careful consideration of the entire record herein, and for the reasons more fully set forth below, the Court will grant the motion of defendant to impose sanctions on counsel for plaintiffs.

Factual Background

The facts giving rise to defendant's motion to impose sanctions are not simple. In May of 1980, plaintiffs filed suit against defendant alleging that the birth defects suffered by their second child, Anne Koller, were caused by the drug Bendectin that Cynthia Koller allegedly ingested during the first trimester of her pregnancy. On December 22, 1982, Ms. Janowski, secretary to Mr. Allis, telephoned counsel for defendant on two occasions and stated that the Butler firm was committing a fraud on the Court as counsel knew that Cynthia Koller had not taken Bendectin during the first trimester of her pregnancy—the critical period. Counsel for defendant informally advised the Court of this development and later formally advised the Court of the events after confirming the identity of Ms. Janowski and arranging for independent counsel to advise her.

On December 27, 1982, Allis, after conferring with Butler and other members of the firm, met with Janowski at the California Hospital where she was visiting her hospitalized premature infant. The purpose of Allis' visit was to determine what, if anything, Janowski had related to counsel for defendant. Following this visit, Allis conferred with Floyd

T. Humphries, Jr., an investigator regularly retained by the Butler firm, to discuss the contacts between Janowski and defendant. Allis made the decision to visit Janowski at her home that evening and not only requested Humphries to accompany him but also requested him to surreptitiously record the conversation. Allis also prepared a typed statement retracting the statements made by Janowski to counsel for defendant with the express purpose of presenting it to Janowski for her signature. During the visit at Janowski's apartment, Humphries recorded portions of the conversation and Janowski signed the statement prepared by Allis under "penalty of perjury." However, on January 3, 1983, Janowski, through counsel, disavowed the truthfulness of the prepared statement and charged that it was obtained under duress and on an offer to continue payment of her salary and fringe benefits, including hospitalization for her premature infant, by the Butler firm.

The facts surrounding the second incident of alleged misconduct relate to the release of certain information to the media. On January 17, 1983, the Court issued an Order excluding the DERs of Marco Cordova and Pauline Sand from evidence in this case as unreliable and highly prejudicial to defendant. In a separate Order, dated January 24, 1983, evidence from all DERs filed more than one year after the birth of a child were excluded from evidence. Six days later, James Butler released fourteen DERs to the media. Among the fourteen were those related to Anne Koller, Marco Cordova, Pauline Sand, and others originally filed more than one year after the birth of the child.

DISCUSSION

It is well settled that an attorney's admission pro hac vice in a case is the granting of a privilege and not a right. *See*

In Re Belli, 371 F. Supp. 111, 112 (D.D.C. 1974) citing *Thomas* v. *Cassidy*, 249 F.2d 91 (4th Cir. 1957), *cert. denied, Fitzgerald* v. *Cassidy*, 355 U.S. 958 (1958). Thus, the revocation of pro hac vice admission, unlike the revocation of a license to practice law in a disciplinary proceeding, is in the sound discretion of the court. *In Re Belli*, 371 Supp. at 112. Accordingly, conduct which may fall short of a violation of a Disciplinary Rule of the Code of Professional Responsibility may be sufficiently impermissible to warrant the denial or revocation of an attorney's pro hac vice appearance. *See Id.; Thomas* v. *Cassidy*, 249 F.2d 91 (4th Cir. 1957). This is not to say, however, that an attorney with pro hac vice status should not be afforded notice and an opportunity to respond in certain circumstances when a court seeks to revoke the privileged admission. *See Johnson* v. *Trueblood*, 629 F.2d 302, 303 (3rd Cir. 1980).

While there is no strict test for determining whether a nonresident attorney's pro hac vice appearance in a case should be revoked during the course of a trial, a general test is whether the conduct of the attorney was so impermissible as to warrant the revocation of his admission pro hac vice. *Cf. In Re Belli*, 371 F. Supp. at 112. When exercising its discretion the court must be mindful of the fact that any decision to revoke an attorney's pro hac vice status may have repercussions in the attorney's "home" state and may adversely affect the client's case. *See Johnson*, 629 F.2d at 304. A court, however, must also weigh and give serious consideration to the importance of maintaining the integrity of both the court and the judicial process.

The first occurrence of alleged misconduct under the Court's consideration is Allis' preparation and procurement of a statement of retraction by Ms. Janowski. Plaintiffs assert that his preparation and procurement of the retrac-

tion was an attempt by Allis to fulfill his obligation under the Code of Professional Responsibility (Code) to zealously represent the interest of his clients and not an attempt to mislead this Court. Expert witnesses called by Allis testified that his conduct was justified and consistent with the Code. However, the opinions of the expert witnesses are unconvincing and not accepted by the Court as the totality of the evidence, including the circumstances surrounding the preparation and procurement of the retraction from Janowski, proves the unjustifiability of Allis' conduct in presenting the retraction to the Court without explanation. There is no doubt that Allis, under the broad provisions of Canon 7 and Canon 2 of the Code, has the duty and ethical obligation to not only zealously pursue the interest of his clients but also to investigate whether Cynthia Koller was committing a fraud upon the court thereby making the suit worthless and a waste of judicial resources. *See* DR 7-102(A)(3), 7-102(A)(6); DR 2-110(B)(1). Allis was not merely conducting an investigation in the interest of his clients and in fulfillment of his obligations to the Court as the credible and probative evidence in the record reveals that the primary, if not the only reason, Allis and Humphries visited Janowski on December 27, 1983, was to obtain a retraction. Assuming *arguendo* that securing a statement of retraction was not the sole reason for Allis' visit, the evidence shows that procuring the retraction was clearly a controlling factor in his decision to meet with Janowski. Moreover, the impropriety of Allis' conduct is evident by 1) Allis' collaboration with Humphries to surreptitiously record a portion of his conversation with Janowski; 2) Allis' testimony under oath that he had no intention of informing the Court of the findings of his "investigation"; 3) Allis' failure to read the prepared statement line-by-line to Janowski to ensure that she understood the contents of the statement before signing; and 4) Allis' procurement of the statement irrespective of the erratic behavior displayed by Janowski during his visit on December 27. At best, Allis' conduct can be characterized as an attempt to thwart a true investigation of a crucial witness in this case in pursuit of protecting the interests of his clients. Clearly, this is not the nature of an investigation where the objective is to ascertain the truth and thereby to assist in preventing any acts of fraud upon the court. *See* DR 7-102(B)(1).

The Court will now turn to James Butler's release of fourteen DERs to the Post on January 28, 1983. As previously indicated, thirteen of the fourteen DERs released by Butler were excluded from evidence by previous Orders of this Court by its findings that they were highly prejudical to defendant. Plaintiffs contend that any sanctions imposed by this Court for Butler's release of this information would constitute a serious abridgement of his first amendment rights. Although it is a cardinal principle of constitutional law that lawyers do not "surrender their First Amendment rights at the Courthouse door", it is also well established that attorneys, as officers of the court with many privileges and responsibilities, are subject to judicial sanctions. *In Re Halkin*, 598 F.2d 176 (D.C. Cir. 1979); *Hirschkop* v. *Snead*, 594 F.2d 356 (4th Cir. 1977). One such responsibility is to refrain from any conduct which will obstruct the administration of justice, such as the circumvention of a court's ruling on the admissibility of evidence. Butler's knowing release to the Post of information previously ruled inadmissible by this Court was a flagrant circumvention of the Orders of this Court as Mintz's article appeared in the Post in February 1983 after the jury panel had been drawn for that month and after the Court and the

parties were preparing for trial. In addition, Butler's refusal of the Court's suggestion that he explain his actions during the hearings merely buttress the Court's conclusion that his release of the DERs to the media was calculated to prejudice the defendant's case and circumvent the Court's prior rulings.

Plaintiffs maintain, however, that revocation of the pro hac vice admission of plaintiffs' counsel would be fatal to plaintiffs' case. This Court is not convinced that this would be the result if the Butler firm is disqualified from further representation of plaintiffs in this case. Plaintiffs initially retained the law firm of Eaton and Associates, Washington, D.C., and Cohen and Kokus of Miami, Florida. Clearly, remaining counsel can provide plaintiffs with competent counsel. For example, the Eaton firm represented the plaintiffs in the *Mekdeci* case—a Bendectin case. Plaintiffs' case would not be jeopardized by the disqualification of the Butler firm. In addition, the possible effects the disqualification of the Butler firm may have in California, the home state of plaintiffs' counsel, do not outweigh the strong public interest in maintaining the integrity of the judicial process. In short, the course of conduct of plaintiffs' counsel as a whole was so impermissible as to warrant this Court's exercise of its discretion to revoke the pro hac vice appearance of Nicholas Allis and James Butler thereby disqualifying the Butler firm from further representation of plaintiffs in this case. Accordingly, the motion of defendant to impose sanctions is granted. An Order consistent with this Opinion will be entered on this date.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

Date: January 6, 1984

Order of the District Court
Dated January 6, 1984

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 80-1258

FILED
JAN 6 1984
Clerk, U.S. District Court
District of Columbia

ANNE ELISABETH KOLLER, *et al.*,

Plaintiffs,

v.

RICHARDSON-MERRELL, INC.,

Defendant.

ORDER

Upon consideration of the motion of defendant to impose sanctions on counsel for plaintiffs, the Order of the Court requiring James G. Butler, Esq., and Nicholas R. Allis, Esq. to show cause why they and their firm should not be disqualified, the opposition, the evidence, the argument of counsel, the entire record herein, and consistent with the Memorandum Opinion of even date, it is this 6th day of January, 1984.

ORDERED that the motion of defendant be and hereby is granted in part; and it is further

Order of the District Court

ORDERED that the *pro hac vice* appearance of James G. Butler, Esq., as counsel for plaintiffs herein be, and hereby is, revoked; and it is further

ORDERED that the *pro hac vice* appearance of Nicholas R. Allis, Esq., as counsel for plaintiffs be, and hereby is, revoked; and it is further

ORDERED that the appearance of the firm, Butler, Jefferson, Dan and Allis be, and hereby is, revoked.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

Notice of the Court of Appeals
Entry of Judgment Dated May 29, 1984

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

WASHINGTON, D.C. 20001

GEORGE A. FISHER
CLERK

May 29, 1984

RE: No. 84-5039—Anne Elisabeth Koller, an infant, by and through John Lamont Koller and Cynthia Anne Koller, her natural guardians, et al.; James G. Butler, Nicholas R. Allis and the law firm of Butler, Jefferson, Dan and Allis v. Richardson-Merrell, Inc., a Delware Corporation

Dear Counsel:

Enclosed herewith are three (3) copies of the opinion in the above entitled case.

Please note that the judgment has been entered on the same date as the opinion and is for mandate purposes only.

Sincerely,

/s/ DENISE C. THOMAS
Denise C. Thomas
Opinions Clerk

Order of the Court of Appeals
Denying Petition for Rehearing
Dated July 17, 1984

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 80-01258

Filed Jul 17 1984

GEORGE A. FISHER
Clerk

No. 84-5039

Anne Elisabeth Koller, et al.,
James G. Butler, et al.,
Appellants

v.

Richardson-Merrell, Inc., A Delaware Corporation

BEFORE:

WALD and MIKVA, Circuit Judges, and RICHEY*, District Judge, United States District Court for the District of Columbia

---

* Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

Order of the Court of Appeals
Denying Rehearing

ORDER

On consideration of the Petition for Rehearing of Appellees filed June 28, 1984, it is

ORDERED by the Court that the aforesaid Petition for Rehearing is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, Clerk

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Order of the Court of Appeals
Denying Petition for Rehearing *En Banc*
Dated July 17, 1984

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 80-01258

Filed Jul 17 1984

GEORGE A. FISHER
Clerk

No. 84-5039

Anne Elisabeth Koller, et al.,
James G. Butler, et al.,

Appellants

v.

Richardson-Merrell, Inc., A Delaware Corporation

BEFORE:

ROBINSON, Chief Judge; WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, CINSBURG, BORK, SCALIA and STARR, Circuit Judges, RICHEY*, District Judge, United States District Court for the District of Columbia

* Sitting by Designation pursuant to Title 28 U.S.C. § 292(a).

Order of the Court of Appeals
Denying Rehearing En Banc

ORDER

The Suggestion for Rehearing *en banc* of Appellees has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, Clerk

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Circuit Judge Wilkey did not participate in this order.

Statute and Rules Involved

UNITED STATES CODE

28 U.S.C. § 1291. Final decisions of district courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 52. Findings by the Court.

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the fact specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient

if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Rule 1-4. Appearance and Withdrawal of Attorneys.

(a) *Who May Practice.*

(1) An attorney who is a member in good standing of the bar of this court may enter an appearance, file pleadings and practice in this court if he either (i) maintains an office for the practice of law within the District of Columbia, or (ii) maintains an office in a contiguous area in whose courts a member of the bar of this court who is also a member of the bar of the highest court of the State in which the contiguous area is located is permitted to appear, file pleadings and practice without being required to join of record an attorney having an office in the contiguous area.

(2) An attorney who is a member in good standing of the bar of any United States Court or of the highest court of any State but who does not qualify under the requirements of subsection (1) above may enter an appearance, and file pleadings in this court, provided that such attorney joins of record a member of the bar of this court who does meet the requirements of subsection (1) and who will at all times be prepared to go forward with the case. All

pleadings submitted by out-of-town counsel must also be signed by an attorney who meets the requirements of subsection (1). If such an attorney wishes to be heard in open court, he must in addition secure the permission of the trial judge.

(3) An attorney who meets the requirements of subsection (1) above at the time of the entry of his appearance, but who thereafter removes his office to a location outside the District of Columbia and outside a qualifying contiguous area, shall at the time of such removal join of record in all cases pending in this Court in which his appearance is entered an attorney who meets the requirements of subsection (1).

(4) An attorney who is employed or retained by the United States or one of its agencies may enter an appearance, file pleadings and practice in this court in cases in which the United States or the agency is a party, irrespective of (1)-(3) above.

(5) A State Attorney General or his designee, who is a member in good standing of the bar of the highest court in any State or of any United States Court, may appear and represent the State or any agency thereof, irrespective of (1)-(3) above.

(6) Notwithstanding the provisions of clauses (1) through (3) above, an attorney who is a member in good standing of the District of Columbia Bar may enter an appearance in any case handled without a fee upon filing a certificate with the Court that he is providing representation without compensation, at the same time providing his mailing address and telephone number.

(b) *Entry of Appearance.*

(1) An attorney eligible to appear may enter an appearance in a civil case by signing any pleading or other paper described in Rule 5(a), Federal Rules of Civil Procedure, filed by or on behalf of the party the attorney represents, or by filing a written *praecipe* noting the entry of his appearance and listing his correct address and telephone number.

(2) The Clerk shall not accept any paper signed by an attorney for filing unless the attorney is eligible to appear and has entered his appearance as provided herein.

(c) *Withdrawal of Appearance.*

(1) If a trial date has not been set, an attorney may withdraw his appearance in a civil action by filing a *praecipe*, signed by the attorney and his client, noting such withdrawal, provided that another attorney enters or has entered an appearance on behalf of the client at that time.

(2) If a trial date has been set or if the client's written consent is not obtained, or if the client is not represented by another attorney, an attorney may withdraw his appearance only by order of the court upon motion by the attorney served upon all parties to the case or their attorneys. Unless the client is represented by another attorney or the motion is made in open court in the client's presence, a motion to withdraw an appearance shall be accompanied by a certificate of the moving attorney listing the client's last known address and stating that the attorney has served upon his client a copy of the motion and a notice advising the client to obtain other counsel, or, if he intends to conduct his

case in proper person or to object to the withdrawal, to so notify the Clerk in writing within five days of service of the motion upon him.

(3) The court may deny an attorney's motion for leave to withdraw if his withdrawal would unduly delay trial of the case, be unduly prejudicial to any party, or otherwise not be in the interests of justice. The Clerk shall mail to the affected client a copy of the order granting or denying a motion for leave to withdraw.

Rule 4-3(IV). Standards for Professional Conduct.

(a) For misconduct defined in these Rules, and for good cause shown, and after notice and opportunity to be heard, any attorney admitted to practice before this court may be disbarred, suspended from practice before this court, reprimanded or subjected to such other disciplinary action as the circumstances may warrant.

(b) Acts or omissions by an attorney admitted to practice before this court, individually or in concert with any other person or persons, which violate the Code of Professional Responsibility adopted by this Court shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. The Code of Professional Responsibility adopted by this court is the Code of Professional Responsibility adopted by the District of Columbia Court of Appeals, as amended from time to time by that court, except as otherwise provided by specific Rule of this court, after consideration of comments by representatives of bar associations within this district.

Rule 4-3(VIII). Attorneys Specially Admitted.

Whenever an attorney applies to be admitted or is admitted to this court for purposes of a particular proceeding (*pro hac vice*), the attorney shall be deemed thereby to have conferred disciplinary jurisdiction upon this court for any alleged misconduct of that attorney arising in the course of, in the preparation for, or in connection with such proceeding.

DISTRICT OF COLUMBIA
CODE OF PROFESSIONAL RESPONSIBILITY

DR 1-102. Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude that adversely reflects on his fitness to practice law.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

DR 2-110. Withdrawal from Employment.

. . . .

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw

from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

(1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise havings steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

. . . .

DR 5-105. Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

. . . .

(D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, other than DR 2-110 (B)(3) or (B)(4) or DR 6-101(A)(1), or, in appropriate cases, DR 5-101(A), no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment, provided that any imputed disqualification or restrictions that attach because a lawyer was a public employee shall be determined under Canon 9.

DR 7-102. Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to

rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

DR 7-106. Trial Conduct.

(A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

(B) In presenting a matter to a tribunal, a lawyer shall disclose:

(1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.

(2) Unless privileged or irrelevant, the identities of the clients he represents and of the persons who employed him.

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

(2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.

(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

(5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(7) Intentionally or habitually violate any established rule of procedure or of evidence.

DR 7-107. Trial Publicity.

. . . .

(H) The following text is that of Canon 20 of the Canons of Professional Ethics:

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be

condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.*

(1) The foregoing provisions of DR 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(J) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107.

DR 7-108. Communication with or Investigation of Jurors.

(A) Before the trial of a case a lawyer connected therewith shall not communicate with anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case.

(B) During the trial of a case:

(1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.

---

* By order of February 14, 1975, the District of Columbia Court of Appeals deleted DR 7-107(G) and (H). In lieu of these provisions, the Court retained Canon 20 of the Canons of Professional Ethics.

(2) A lawyer who is not connected therewith shall not communicate with a juror concerning the case.

. . . .

CALIFORNIA PENAL CODE

§ 632. Eavesdropping on or recording confidential communications.

(a) *Prohibited acts; punishment; recidivists.* Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records such confidential communication, whether such communication is carried on among such parties in the presence of one another or by means of a telegraph, telephone or other device, except a radio, shall be punishable by fine not exceeding two thousand five hundred dollars ($2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison, or by both such fine and imprisonment in the county jail or in the state prison. If such person has previously been convicted of a violation of this section or Section 631 or 636, he is punishable by fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison, or by both such fine and imprisonment in the county jail or in the state prison.

(b) *Person.* The term "person" includes an individual, business association, partnership, corporation, or other legal entity, and an individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state, or local, but excludes an individual

known by all parties to a confidential communication to be overhearing or recording such communication.

(c) *Confidential communication.* The term "confidential communication" includes any communication carried on in such circumstances as may reasonably indicate that any party to such communication desires it to be confined to such parties, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

(d) *Evidence.* Except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative or other proceeding.

(e) *Exceptions.* This section shall not apply (1) to any public utility engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof, where the acts otherwise prohibited herein are for the purpose of construction, maintenance, conduct or operation of the services and facilities of such public utility, or (2) to the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of such a public utility, or (3) to any telephonic communication system used for communication exclusively within a state, county, city and county, or city correctional facility.

(f) *Hearing aids.* This section does not apply to the use of hearing aids and similar devices, by persons afflicted with impaired hearing, for the purpose of overcoming the impairment to permit the hearing of sounds ordinarily audible to the human ear.

§ 633.5. Recording communications relating to commission of extortion, kidnapping, bribery, felony involving violence against the person, or violation of § 653m

Nothing in Section 631 or 632 shall be construed as prohibiting one party to a confidential communication from recording such communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to such communication of the crime of extortion, kidnapping, bribery, any felony involving violence against the person, or a violation of Section 653m, and nothing in Section 631 or 632 shall be construed as rendering inadmissible in a prosecution for extortion, kidnapping, bribery, any felony involving violence against the person, or a violation of Section 653m, or any crime in connection therewith, any evidence so obtained.

Office - Supreme Court, U.S.
FILED
SEP 22 1984
ALEXANDER L. STEVAS
CLERK

No. 84-127

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARDSON-MERRELL INC.,
Petitioner,

v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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33 pp

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
A. The Facts	1
B. The District Court's Opinion	6
C. The Opinion of the Court of Appeals	8
INTRODUCTION AND SUMMARY OF ARGUMENT	13
ARGUMENT	14
CONCLUSION	28

TABLE OF AUTHORITIES

CASES	Page
Aetna Casualty & Sur. Co. v. United States, 570 F.2d 1197 (4th Cir.), *cert. denied*, 439 U.S. 821 (1978)	20
Ah Ju Steel Co. v. Armco, Inc., 680 F.2d 751 (C.C.P.A. 1982)	20
Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980) (*en banc*), *vacated on other grounds*, 449 U.S. 1106 (1981)	21, 23
Barker v. Wingo, 407 U.S. 514 (1972)	21
Board of Education of New York City v. Nyquist, 590 F. d 1241 (2d Cir. 1979)	9, 16
Cobbledick v. United States, 309 U.S. 323 (1940)..	26
(1940)	26
Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949)	26
Duncan v. Merrill Lynch, 646 F.2d 1020 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981)	21, 23, 24
Flanagan v. United States, —— U.S. ——, 104 S. Ct. 1051 (1984)	9, 13, 20-26
Freeman v. Chicago Musical Instrument Co., 689 F.2d 715 (7th Cir. 1982)	21, 23, 24
General Mill Supply Co. v. SCA Serv., Inc., 698 F.2d 704 (6th Cir. 1982)	20
Gough v. Perkowski, 694 F.2d (9th Cir 1982)	20, 23, 24, 26
In re Multi-Piece Rim Prod. Liab. Litig., 612 F.2d 377 (8th Cir. 1980), *vacated on other grounds sub nom. Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981)	20
Interco Systems, Inc. v. Omni Corporate Service, 733 F.2d 253 (2d Cir. 1984)	20
International Business Machines v. Levin 579 F.2d 271 (3d Cir. 1978)	20
Kevlik v. Goldstein, 724 F.2d 844 (1st Cir. 1984)....	20
Laughlin v. Eichler, 145 F.2d 700 (D.C. Cir. 1944), *cert. denied*, 325 U.S. 866 (1945)	16
NCK Organization Ltd. v. Bregman, 542 F.2d 128 (2d Cir. 1976)	19

TABLE OF AUTHORITIES—Continued

	Page
Norton v. Tallahassee Memorial Hosp., 689 F.2d 938 (11th Cir. 1982)	20
Paul E. Iacono Structural Engineering, Inc. v. Humphrey, 722 F.2d 435 (9th Cir.), *cert. denied*, 104 S. Ct. 162 (1983)	19
Pullman-Standard v. Swint, 456 U.S. 273 (1982)..	19
Reed v. Shell Oil Company, 518 F.2d 311 (10th Cir. 1975)	19
State v. Kavanaugh, 52 N.J. 7, 243 A.2d 225, *cert. denied sub nom. Matzner v. New Jersey*, 393 U.S. 924 (1968)	15
United States v. Dintz, 538 F.2d 1214 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977)	16
United States v. Greger, 657 F.2d 1109 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 1891 (1983)	20
United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982)	21
Viereck v. United States, 130 F.2d 945 (D.C. Cir. 1942), *rev'd on other grounds*, 318 U.S. 236 (1943)	16
CONSTITUTION	
United States Constitution	
Fifth Amendment	21
Sixth Amendment	21
MISCELLANEOUS	
District of Columbia Code of Professional Responsibility	*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-127

RICHARDSON-MERRELL INC.,
Petitioner,

v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

For the reasons stated herein, respondents believe that petitioner's request for a writ of certiorari should be denied.

STATEMENT OF THE CASE

A. *The Facts*

This is a suit by an infant child and her parents, the Kollers, against petitioner, Richardson-Merrell Inc., alleging that the child was born without arms and legs

because of her mother's ingestion during pregnancy of defendant's product, the drug Bendectin. Nearly three years after the suit was brought, and shortly before trial was scheduled to begin, petitioner moved for sanctions against the Kollers' primary counsel, Messrs. Allis and Butler, alleging two discrete acts of misconduct. The trial was then postponed indefinitely, and for the next eleven months the case changed from an inquiry into petitioner's alleged wrong to a massive inquiry into the conduct of Allis and Butler. This diversion entailed extensive discovery and several days of hearings, through which the court and petitioner became privy to "the minute details" of innumerable communications between plaintiffs and their lawyers, and between various of the plaintiffs' lawyers. Pet. App. 48a.

From the record amassed in the proceedings concerning the alleged misconduct of Allis and Butler, the material facts emerged undisputed. The undisputed evidence relating to Allis' conduct is summarized in detail in the opinion of the Court of Appeals. Pet. App. 5a-17a, 41a-48a. In brief that evidence shows the following: Allis learned that his secretary had told another employee of his law firm that the defendant in the *Koller* case was offering her financial inducements and harassing her in an effort to get her to sign a false statement that Mrs. Koller had admitted not taking Bendectin during the first trimester of her pregnancy. Upon learning this information, Allis contacted his secretary, who was then on maternity leave; she repeated the same thing to him, and indicated her willingness to sign a statement to that effect. Allis learned that his secretary had also told the same thing to one of her close personal friends.

Allis drafted a short statement based on what his secretary had said to him and, accompanied by an investigator regularly employed by his firm, proceeded to his secretary's apartment for the purpose of asking her to review and sign the statement. With minor changes and

corrections, Allis' secretary signed the statement, the substance of which is set out verbatim in the Court of Appeals' opinion. Pet. App. 9a-10a. Unbeknownst to his secretary, Allis and the investigator tape-recorded the conversation so that there could be no question as to what was said. A transcript of the tape is in evidence and shows that, in the words of the Court of Appeals, Allis' secretary "once again repeated the story she had related to Allis earlier that defendants were trying to induce her to sign a false statement about Mrs. Koller, and she confirmed her willingness at the time to sign a statement for Allis describing those inducements". Pet. App. 6a-7a.[1]

Allis had ample reason to believe, and did in fact believe, that Mrs. Koller had taken Bendectin during the critical period of her pregnancy and that she had never told his secretary the contrary. Indeed, the tape of the meeting with Allis' secretary reflects that, prior to signing the statement, Allis' secretary explicitly and repeatedly affirmed that she had never had such a conversation with Mrs. Koller. Pet. App. 7a-9a n.12. There is no dispute that the substance of the statement that Allis obtained from his secretary—*i.e.*, that she had not heard

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[1] The Statement of the Case in the petition (pp. 7-8) relies heavily upon testimony petitioner (defendant) later elicited from Allis' secretary. As the Court of Appeals explained, Pet. App. 14a & n.27, 49a, the secretary's credibility had been gravely impeached (*inter alia* by the fact that she was receiving financial benefits from defendant), the defendant advised the district court that it was not relying on her testimony in seeking Allis' disqualification, and the district court viewed her testimony as not material to the resolution of the disqualification motion.

Among the "facts" that the petition (at p. 8) asserts (solely on the word of the secretary) is that Allis obtained his secretary's statement by promises of benefit. The district court made no finding that there were such promises, and indeed made no reference to any such alleged promises in its opinion. The state of the record on this subject is described in the Court of Appeals' opinion at Pet. App. 45a-47a.

Mrs. Koller say that she did not take Bendectin, and that defendant had promised her considerable financial benefits if she would sign a statement saying that she *had* heard Mrs. Koller say that—was precisely what the secretary had voluntarily told Allis, as well as others, more than once that very day.[2]

The undisputed evidence relating to Butler's conduct is also summarized in detail in the opinion of the Court of Appeals. Pet. App. 17a-20a, 50a-52a, 54a-55a. In essence, that evidence shows the following: Butler sent to the Commissioner of the Food & Drug Administration fourteen case histories involving mothers who had taken Bendectin while pregnant and then given birth to severely deformed children. In a cover letter to the Commissioner, Butler stated that these case histories together with other information already in the FDA's possession "seems to me to demand an immediate review by the Food and Drug Administration to take this noxious drug off the market before it can do any more harm." JA 1513.[3] Butler sent copies of his letter and of the enclosed case histories to Morton Mintz, a reporter for the *Washington Post* who for many years had covered the drug industry and the FDA, and who had published at least eight previous by-line articles about Bendectin. Butler's letter to Mintz did not discuss the *Koller* litigation but rather stated that "I have known and admired your articles on the drug industry and I thought that these [enclosures] might be of particular interest to you." JA 1515.

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[2] There is a dispute in the testimony as to whether, at the time he obtained the statement from his secretary, Allis believed that his secretary had already given to defendant a statement such as she claimed defendant was seeking from her. See Pet. App. 17a & n.34. The district court in its opinion made no express finding on this point, but did describe Allis' conduct as seeking a "retraction" (Pet. App. 74a, 75a, 76a).

[3] "JA" citations are to the Joint Appendix in the Court of Appeals.

Some of the case histories sent by Butler to the Commissioner and Mintz had been excluded from evidence in the *Koller* case in a pretrial evidentiary ruling by the district court. The district court had not ordered this excluded evidence to be sealed nor issued any protective order barring public disclosure of the evidence. At the time the letters to the Commissioner and Mintz were sent, no jury had been selected in the *Koller* case and the trial was expected to commence within a period of a few weeks. The only direct evidence respecting Butler's motivation was contained in two affidavits submitted by Butler to the district court. As summarized by the Court of Appeals, Butler testified as follows (Pet. App. 19a-20a):

> . . . Butler denied any intent to influence the jury in circumvention of the January evidentiary rulings. J.A. 271, 273-74. Butler stated as his sole motivation that over two years of research on Bendectin had convinced him that it was a dangerous drug that should be taken off the market without further delay. Apparently as an explanation for the particular timing of the release on January 28, he averred that not until January had he received authorization from the parents to release the information to the FDA and the press. J.A. 273.

Butler did not testify in open court, although the district court suggested he might do so.

After receiving the letter from Butler, Mintz contacted Butler for an interview. Mintz also interviewed representatives of petitioner. The only indication in the record as to the substance of the interview with Butler is the content of the article that Mintz subsequently published. That article made no mention of the excluded case histories; the article did refer to "14 cases," a reference to seven cases where lawsuits had been filed and seven other cases where "[l]awyers have been retained." JA 1516. The only references to the *Koller* case in the article, apart from two sentences of non-controversial de-

scriptive material about the Koller child, were attributed to "a company spokesman": "there is no evidence that it caused Anne Koller's birth defects"; "there is a serious question when Mrs. Koller may have taken Bendectin." JA 1516. The remainder of the article was a balanced description of the varying positions of the FDA, the Public Litigation Health Research Group, Butler, and the petitioner respecting the dangers of Bendectin.

At 10:00 a.m. on the day Mintz's article appeared, petitioner filed in the district court a fully prepared motion, with extensive supporting papers, seeking sanctions against Butler.

B. *The District Court's Opinion*

At the culmination of the inquiry into the conduct of Allis and Butler, the district court issued an order disqualifying Allis, Butler, and their law firm from representing the plaintiffs in the *Koller* case. In so ruling, the court made no finding that either Allis or Butler had violated any ethical standard. Nor did the court find that the actions of these lawyers would in any way interfere with the ability of the court to conduct a fair trial in the *Koller* case. Rather, because Allis and Butler were appearing in the case on the basis of a *pro hac vice* admission, the court believed it had the power to revoke their appearances—and thus to deprive the Kollers of the counsel of their choice—without any finding that the lawyers had committed a defined act of wrongdoing. The court reasoned that because "an attorney's admission pro hac vice in a case is the granting of a privilege and not a right[,] . . . the revocation of pro hac vice admission . . . is in the sound discretion of the court." Pet App. 74a-75a. Accordingly, the court held that "conduct which may fall short of a violation of a Disciplinary Rule of the Code of Professional Responsibility may be sufficiently impermissible to warrant the . . . revocation of an attorney's pro hac vice appearance." Pet. App. 75a.

Pursuant to this broad assertion of power, the district court faulted Allis for "preparation and procurement" of the written statement of his secretary. Pet. App. 75a. The fault, as found by the court, was that Allis "zealously pursue[d] the interest of his clients" while neglecting his "duty and ethical obligation . . . to investigate whether Cynthia Koller was committing a fraud upon the court thereby making the suit worthless and a waste of judicial resources." Pet. App. 76a. The court believed that Allis had a duty to the court to investigate a possible fraud by his client—even though the court did not find, and the evidence would not have supported a finding, that Allis lacked a reasonable basis for believing in the good faith of the Kollers' claim. That duty, the court stated, obliged Allis to abandon "pursuit of protecting the interests of his clients" in favor of "an investigation where the objective is to ascertain the truth and thereby to assist in preventing any acts of fraud upon the court." Pet. App. 77a. Accordingly, the court concluded, Allis' failure to so abandon his clients' interests—his preparation and procurement of the statement from his secretary—"can be characterized as an attempt to thwart a true investigation of a crucial witness in this case in pursuit of protecting the interests of his clients." Pet. App. 77a.[4]

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[4] The court cited four specific considerations as making "evident" the "impropriety of Allis' conduct", expressly refusing to "accept[]" the testimony of two experts in legal ethics (David Austern and Thomas Lumbard) that Allis' conduct was proper. (Pet. App. 76a). Those four considerations were:

(1) "Allis' collaboration with [the investigator] to surreptitiously record a portion of his conversation with [his secretary]." *Id.*

(2) "Allis' testimony under oath that he had no intention of informing the Court of the findings of his 'investigation'." *Id.* [Allis' actual testimony was that at the time he prepared and ob-

With respect to Butler, the district court concluded that the release of information to Mintz was a "flagrant circumvention" of the evidentiary rulings of the court. Pet. App. 77a. The court stated that "Butler's refusal of the Court's suggestion that he explain his actions during the hearings merely buttress the Court's conclusion that his release of the [case histories] to the media was calculated to prejudice the defendant's case and circumvent the Court's prior rulings." Pet. App. 78a.

C. *The Opinion of the Court of Appeals*

The *Koller* plaintiffs, as well as Allis, Butler and their law firm, took an immediate pretrial appeal from the district court's disqualification order. The Court of Appeals reversed that order.

At the threshold, the Court of Appeals determined that orders disqualifying counsel in civil cases are immediately appealable under the collateral order exception to the final judgment rule. In reaching that determination the Court carefully considered this Court's decision in *Flanagan v. United States*, —— U.S. ——, 104 S. Ct. 1051 (1984) (holding that a disqualification order in a criminal case is not immediately appealable), and decided that the factors that led to the result in *Flanagan* are not present in civil cases.

The court then rejected the critical premise of the district court's holding: that, under the applicable local rules of court, "*pro hac vice* counsel, once admitted, are subject to disqualification more readily than regularly admitted counsel." Pet. App. 34a-35a. "Particularly in the federal courts of the District of Columbia, we think it would be unwise to introduce into litigation an unwarranted disadvantage against parties with non-resident counsel by subjecting that counsel more readily to removal." Pet. App. 35a.

The Court of Appeals proceeded to consider whether "the conduct of Allis and Butler provides adequate grounds for disqualification under the standards applicable to regularly admitted attorneys." Pet App. 37a. In this connection, the court, agreeing with the approach of the Second Circuit in *Board of Education of New York City v. Nyquist*, 590 F.2d 1241 (2d Cir. 1979), stated the following guiding principles (Pet. App. 38a-39a, and n.49):

> We agree that disqualification is warranted only rarely in cases where there is neither a serious question as to counsel's ability to act as a zealous and effective advocate for the client, . . . nor a substantial possibility of an unfair advantage to the current client because of counsel's prior representation of the opposing party . . . or prior responsibility as a government official . . . Except in cases of truly egregious misconduct likely to infect future proceedings, other means less prejudicial to the client's interest than disqualifying the counsel of

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tained the statement from his secretary, he had not yet determined what use he would make of it. J.A. 946-47, 966-67. See Pet. App. 43a. The petition notes (at p. 8) that the day after the statement was obtained, a copy was mailed by plaintiff's counsel to the court. The petition does not mention that the morning after the statement was obtained, plaintiffs' counsel received a copy of a letter from defendant's counsel to the court declaring that Allis' secretary had told defendant's counsel the *Koller* case was fraudulent, and that the secretary's statement was sent to the court in response to that letter. Pet. App. 11a-13a.]

(3) "Allis' failure to read the prepared statement line-by-line to [his secretary] to ensure that she understood the contents of the statement before signing." Pet. App. 76a-77a. [The undisputed evidence—the tape of the meeting at which the statement was signed—reflects that the secretary read the statement and made changes and corrections and that the statement was consistent with what the secretary had stated orally before signing. J.A. 1477, 1479-81, 1488, 1493-95. See Pet. App. 9a n.12, 43a].

(4) "Allis' procurement of the statement irrespective of the erratic behavior displayed by [his secretary] during his visit on December 27." Pet. App. 77a.

her choice are ordinarily available to deal with ethical improprieties by counsel.[49]

[49] For example, the court may issue a formal reprimand or, in more serious cases, a contempt citation either during or after the proceedings; it may also refer possible ethical improprieties to the disciplinary bodies of the local bar or, in the case of attorneys admitted *pro hac vice*, to the bar of the attorney's home state.

Applying these principles to the case at hand, the court concluded that, given the totality of the circumstances Allis had encountered, his actions "did not constitute misconduct." Pet. App. 47a-48a. The court reasoned from the following basic premise (Pet. App. 39a-40a):

> Counsel in both criminal and civil cases frequently face situations in which there is some evidence tending to cast doubt upon the credibility of the client or the validity of the claim. Yet the adversary system is based on the premise that the truth is better ascertained in such instances through the zealous and competent presentation by each side of its strongest case. The fundamental obligations of an attorney to his client—the bedrock principle of the adversary system—does not dissolve with the appearance of unfavorable evidence or even an allegation of fraud. The attorney's duty to the client is, of course, not without limits. In the familiar words of Canon 7 of the Code, "[T]he duty of a lawyer, both to his client and to the legal system, is to represent his client zealously *within the bounds of the law*," EC 7-1 (emphasis added). The legal profession continually struggles to define the point at which the attorney's basic loyalty to the client must give way, for that point is very much at the heart of the adversary system.

The court determined the locus of that point by reference to the Disciplinary Rules of the Code of Professional Responsibility. Those rules, which the court quoted

at Pet. App. 40a, require an attorney to act contrary to his client's interests only if he "knows or it is obvious" that evidence is false, or if he "receives information clearly establishing that . . . [h]is client has . . . perpetrated a fraud." The court reasoned (Pet. App. 40a-41a):

> The Disciplinary Rules require objective and informed recognition by an attorney that specific evidence or a client's claims are fraudulent before imposing on the attorney an affirmative obligation to take actions that may be contrary to the interests of the client. An attorney faced with a potential conflict between the duty to the client and the duty not to perpetrate a fraud on the tribunal is entitled to rely on the standards of the Code of Professional Responsibility and should not be disqualified for conduct that falls within the general ambit of those provisions but does not violate the Disciplinary Rules. To permit disqualification for purported misconduct that falls short of a violation of these standards might well penalize conduct that could reasonably be deemed mandatory in fulfilling the duty to pursue zealously the interests of the client.

The court proceeded to evaluate Allis' conduct under the objective requirements of the Disciplinary Rules. In so doing, the court accepted the factual findings of the district court and relied upon additional facts that were undisputed in the record of the case. The court concluded (Pet. App. 42a, footnote omitted):

> In the absence of any finding—or indeed any evidence—that Allis knew or that it was obvious that [his secretary's] claims to him were false or his clients' case fraudulent, we can find no impropriety in his visit to [his secretary] for the purpose of obtaining a "retraction" of any damaging and, according to Allis' belief, false statements made to the defense.

With respect to Butler, the Court of Appeals again accepted for purposes of its analysis the factual findings of the district court.[8] Although the district court had not found Butler to have violated any ethical standards, petitioner argued that the Court of Appeals should find that Butler's conduct violated Cannon 20, District of Columbia Code of Professional Responsibility DR 7-107 (H), which deals directly with press comments by counsel in civil cases. The Court of Appeals noted that there are substantial arguments against an interpretation of Canon 20 that would prohibit Butler's conduct, and that significant constitutional issues would be raised by a proscription of communications relating to issues of much broader public importance than simply the outcome of a particular trial—*e.g.*, whether the Food and Drug Administration should ban a drug from the market. Pet. App. 54a & nn. 65, 66. But, applying the general guidelines the court had previously set forth, the court found it unnecessary to decide whether Butler had violated Canon 20 (Pet. App. 56a, 71a):

> While Butler's decision to release the [case histories] to the press precisely when he did is not to be applauded, we do not believe that this record could support a finding that his conduct was likely to infect future proceedings. Under these circumstances, we cannot approve his disqualification, with the attendant prejudice to his clients, on the basis of this episode.

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[8] The court expressed doubt "as to the basis for the [district] court's finding that Butler's intent was to 'prejudice the defendant's case' and circumvent the [district] court's evidentiary rulings." Pet. App. 51a. But the court accepted that finding for purposes of its analysis. *Id.*

INTRODUCTION AND SUMMARY OF ARGUMENT

Depriving a party in a civil case of the counsel of its choice is a serious matter. As the court below noted, "[t]he tactical use of motions to disqualify counsel in order to delay proceedings, deprive the opposing party of counsel of its choice, and harass and embarrass the opponents has become so prevalent in large civil cases in recent years as to prompt frequent judicial and academic commentary." Pet. App. 27a. The Court of Appeals' opinion is a well-considered, measured treatment of the competing interests in protecting the integrity of the judicial process and preventing abusive use of disqualification motions. The legal standard applied by the Court of Appeals is consistent with that of other circuits. And the application of that standard to the material facts here—which are undisputed—is unexceptionable. None of petitioner's challenges to the Court of Appeals' decision merits plenary review by this Court.

The first three questions presented in the petition raise issues that are not in fact posed by this case and/or have no serious claim to the time and attention of this Court. See pp. 14-20, *infra*. Nor is there reason for this Court to address at this time the fourth question presented—whether an order disqualifying counsel in a civil case is subject to immediate appeal. On that question, the decision below is in line with the uniform view of the ten other circuits that have addressed the issue. And that uniform view is not inconsistent with this Court's resolution, in *Flanagan v. United States*, —— U.S. ——, 104 S. Ct. 1051 (1984), of the quite different question whether the pretrial disqualification of defense counsel in a criminal case is immediately appealable. On the contrary, because of fundamental differences between criminal and civil litigation, the controlling factors identified in *Flanagan* dictate that disqualification orders in civil cases are collateral orders that are immediately appealable. See pp. 20-26, *infra*. Moreover,

as the court below pointed out (Pet. App. 27a, 57a), unlike in the criminal area, the failure to permit immediate appeals of disqualification orders in civil cases would lead to massive disruption and delay of civil proceedings. See pp. 26-27, *infra*.

ARGUMENT

1. Petitioner's first and third questions presented may be efficiently addressed together. The first question asks: "If a Federal District Court finds that an attorney has been guilty of misconduct in a case pending before it, may it disqualify the attorney from further participation in the case?" Contrary to petitioner's premise, the District Court did not find either Allis or Butler "guilty" of any violation of ethical standards. See *supra* at 6. And, the Court of Appeals concluded, based on the District Court's findings of fact and undisputed record evidence, that Allis' "actions . . . did not constitute misconduct." Pet. App. 48a; *supra* at 10-11. As to Butler, the Court of Appeals found it unnecessary to determine whether his conduct constituted misconduct. See *supra* at 12. The court's disposition of petitioner's quest to disqualify Butler raises the only legal issue even remotely related to petitioner's first question presented: whether the court below applied the correct legal standard in determining that even if Butler's conduct were ethically improper it would not provide a basis for his disqualification. That issue is also apparently the issue intended to be raised by petitioner's third question presented.

The court below did not hold—as petitioner's first question presented implies—that attorney misconduct cannot be a basis for disqualification from further participation in the case. Nor did it hold that the circumstances enumerated in the third question presented could not be the basis for such disqualification. Rather, the court set forth general standards for determining *when* attorney misconduct may be found to justify disqualification, and concluded that on the undisputed facts of this case those standards precluded disqualification of Butler even if his conduct amounted to misconduct.

The court noted that certain ethical violations by their nature "'taint the underlying trial,' by disturbing the balance of the presentations . . ." Pet. App. 38a. The court put into this category a conflict of interest between current clients, the possession of privileged information concerning an adverse party as the result of a prior representation, prior work on the same or a related matter as a government official, and the likelihood that a lawyer would or should be called as a fact witness in the main case. Pet. App. 36a-38a. As to this category of misconduct, the court below made clear that trial courts have a broad discretion, and sometimes a mandate, to disqualify counsel. Pet. App. 36a. But the court found that as to other forms of misconduct, "[e]xcept in cases of truly egregious misconduct likely to infect future proceedings, other means less prejudicial to the client's interest than disqualifying the counsel of her choice are ordinarily available." Pet. App. 38a. In the latter connection, the court pointed to the powers of courts to issue sanctions from formal reprimands to contempt citations, and to refer ethical improprieties to disciplinary bodies of the appropriate bar for sanctions ranging up to suspension and disbarment. Pet. App. 38a-39a & n.49. The court placed the alleged misconduct of Butler in this second category, and determined that there was no basis in the record for determining that his "misconduct"—if such it was—was "likely to infect future proceedings." Pet. App. 56a, 71a.[6]

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[6] The court explained that *State* v. *Kavanaugh*, 52 N.J. 7, 243 A.2d 225, *cert. denied sub nom. Matzner* v. *New Jersey*, 393 U.S. 924 (1963), is consistent with its holding, because the findings in *Kavanaugh* were that the attorney had manifested an unwillingness to "'stay in bounds'" during the future course of that case, "and that subsequent disciplinary proceedings would be inadequate to protect the integrity of the judicial process." Pet. App. 56a.

The legal standards thus applied by the court below do not warrant review by this court. These standards are in accord with those adopted by the Second Circuit in *Board of Education v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979), see Pet. App. 37a-38a, and no other circuit has adopted a contrary rule.[7] The standards are well-calibrated on the one hand to protect the integrity of the judicial process, while on the other hand to guard against the evils that would result from an unnecessarily broad power to disqualify counsel. Those evils, as pointed out by the court below and as illustrated by the instant case, are: needlessly depriving a party of the counsel of its choice; encouraging the tactical abuse of motions to disqualify as a means to delay and disrupt civil litigation; and encouraging the abuse of motions to disqualify

[7] None of the decisions of other circuits cited in the footnotes on pp. 15-16 of the petition conflicts with the standards applied by the court below. All of the decisions in the first footnote, and the first two decisions in the second footnote, involved situations of the first category described by the court below—situations which by their nature "taint the underlying trial" and which the court below held warrant, if not require, disqualification. Two of the decisions in the second footnote fall into the second category, but there was a determination in each that the misconduct was likely to be repeated in the future course of the proceedings. *United States* v. *Dintz*, 538 F.2d 1214, 1222 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); *Laughlin* v. *Eichler*, 145 F.2d 700, 702 (D.C. Cir. 1944), *cert. denied*, 325 U.S. 866 (1945). In the remaining appellate decision cited in the second footnote, *Viereck* v. *United States*, 130 F.2d 945, 961-62 (D.C. Cir. 1942), *rev'd on other grounds*, 318 U.S. 236 (1943), the D.C. Circuit affirmed a conviction although one of the defendant's two trial counsel had been ejected from the courtroom in mid-trial for egregious misconduct. The court's holding was that, as defendant had been represented throughout by an additional lawyer as well, there was no prejudice warranting reversal of the conviction. In a *dictum*, the court stated that "[i]t appears" that the ejection was "perfectly proper." That 42-year-old *dictum* does not, of course, create a "conflict" among the circuits; it was uttered by the same court as rendered the decision below, and was disapproved in the decision below as inconsistent with the current case law. Pet. App. 37a n.48.

as a means to probe into the confidential communications and strategies of an adversary. Pet. App. 27a, 57a.

2. In support of the first part of the second question presented, petitioner claims that "the court below brushed aside the clearly erroneous rule" by "freely ma[king] factual findings different from those made by the district court." Pet. at 17. But petitioner's characterization of what the Court of Appeals did is simply incorrect. The court below explicitly recognized that "we are bound to accept the [district] court's findings on disputed issues of fact unless they are clearly erroneous." Pet. App. 34a. And the court was meticulous in following that rule throughout its opinion; the court accepted for purposes of its analysis all of the district court's findings of fact, and made additional findings of fact only when the evidence was undisputed. See, e.g., Pet. App. 5a n.6; 6a nn.9, 11; 14a n.27; 17a n.34; 42a-44a; 71a.

Petitioner's asserted violations of the clearly erroneous rule do not bear analysis. Thus, while the Court of Appeals questioned the district court's finding that Butler had acted with intent to circumvent the court's evidentiary rulings and prejudice the defendant's case, the Court of Appeals did not set that finding aside but rather accepted it as the premise for analysis. Pet. App. 51a-53a. And, petitioner lifts out of context the court's statement that Allis' taping of the conversation with his secretary "can be more easily understood to reflect a desire to get at the truth and to protect the interest of his client rather than to 'thwart a true investigation,'" Pet. App. 47a. Petitioner ignores that the Court of Appeals had already concluded, as a matter of law, that Allis had no obligation to conduct a "true investigation" in the sense that the district court meant it—*i.e.*, an investigation into whether his own client was committing a fraud. See pp. 10-11, *supra*. Similarly, petitioner misses the point in its reference to the court's *legal* conclusions that, under the standards of law set forth in the opinion,

Butler's conduct could not furnish a basis for disqualification (Pet. App. 56a) and "Allis' actions . . . did not constitute misconduct and do not justify his disqualification from further representation of plaintiffs." (Pet. App. 47a-48a).

The issue petitioner seeks to raise regarding the clearly erroneous rule is simply not presented by this case. And, even were this not so, the issue is not one worthy of this Court's plenary consideration.

3. In support of the second part of the second question presented, petitioner claims that "the court below brushed aside . . . the abuse of discretion standard of review." Pet. at 17. Petitioner maintains that the Court of Appeals disregarded the abuse of discretion standard and substituted "the clearly erroneous rule as to findings of fact, together with review for legal error as to issues of law." Pet. at 19. Again, petitioner has not accurately characterized the Court of Appeals' opinion. The court stated the standard of review as follows (Pet. App. 33a-34a):

> The district court has wide discretion in the exercise of its duty to supervise members of the bar appearing before it. See *Groper v. Taff*, 717 F.2d at 1418. In reviewing the court's decision, we are bound to accept the court's findings on disputed issues of fact unless they are clearly erroneous. The district court's conclusions of law, including its interpretation of the Code of Professional Responsibility, and its application of the law to the facts are of course subject to appellate review for legal error.

Thus, the court did not foreswear the abuse of discretion standard. The court simply recognized that the trial court's discretion is not boundless. A trial court does not have discretion to disqualify an attorney for any reason whatsoever. Its discretion begins only when there exist facts that, applied to the controlling legal standard, establish that disqualification is a course of action available to the district court in the exercise of its discretion. The purport of the Court's opinion is simply that when the power of a trial court to exercise discretion depends on a finding of fact or a conclusion of law, then the former is subject to review under the clearly erroneous standard and the latter is subject to review for legal error.

That result is hardly surprising. As this Court stated in *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982):

> Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from [that standard of review].

And, it is elementary that the interpretation of a rule, for example a Disciplinary Rule of the Code of Professional Responsibility, should be reviewed on the basis of legal error—*i.e.*, whether or not the interpretation is correct. A trial court is not given discretion to interpret such rules; the rules have a meaning, and the trial court's conclusion as to that meaning is either correct or incorrect.

Thus, the dichotomy created by petitioner between courts applying an abuse of discretion standard, on the one hand, and others applying the clearly erroneous rule for issues of fact and the legal error rule for issues of law, on the other hand, is a false one—as is the conflict in the circuits that petitioner asserts.[8] Again, the issue

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[8] The cases cited by petitioner as in conflict with the decision below are in fact entirely consistent with that decision. See, *e.g.*, *Paul E. Iacono Structural Engineering, Inc.* v. *Humphrey*, 722 F.2d 435, 438 (9th Cir.), *cert. denied*, 104 S. Ct. 162 (1983) ("we will not reverse the district court unless the court either misperceives the relevant rule of law . . . or abuses its discretion"); *NCK Organization Ltd.* v. *Bregman*, 542 F.2d 128, 131-135 (2d Cir. 1976) (court states standard is "abuse of discretion" and then goes on to analyze whether trial court correctly applied the governing legal standards and ethical rules); *Redd* v. *Shell Oil Company*, 518 F.2d 311, 314-315 (10th Cir. 1975) (court states standard is "judicial discretion" and then sets forth the legal standards which must be met as a

petitioner would present is not raised in this case, and in any event does not merit this Court's attention.

4. Petitioner's fourth question presented is whether attorney disqualification orders in civil cases are subject to immediate appeal. In our view, there is no reason for the Court to review that question at this time. The result below on this point is in line with the uniform view of the other ten circuits that have decided the point.[9] That result is, as we show below, entirely consistent with this Court's decision in *Flanagan*. And, the result is crucial if the judicial system is to be able to deal with the massive disruptions and harassment that flow from the

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predicate to exercise of that discretion). But cf., *Kevlik* v. *Goldstein*, 724 F.2d 844, 847 (1st Cir. 1984) (*dictum* suggesting that abuse of discretion standard and clearly erroneous standard are mutually exclusive).

[9] The Ninth Circuit, having correctly anticipated the holding in *Flanagan* with respect to criminal cases, *United States* v. *Greger*, 657 F.2d 1109 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 1891 (1983) (disqualification orders in criminal cases not immediately appealable), reached the opposite conclusion with respect to civil cases, *Gough* v. *Perkowski*, 694 F.2d 1140, 1141-45 (9th Cir. 1982) (disqualification orders in civil cases immediately appealable). See also, the following decisions holding disqualification orders in civil cases immediately appealable: *Armstrong* v. *McAlpin*, 625 F.2d 433, 437-41 (2d Cir. 1980) (*en banc*), *vacated on other grounds*, 449 U.S. 1106 (1981); *Interco Systems, Inc.* v. *Omni Corporate Services*, 733 F.2d 253 (2d Cir. 1984) (post-*Flanagan*); *International Business Machines* v. *Levin*, 579 F.2d 271, 277-78 (3rd Cir. 1978); *Aetna Casualty & Sur. Co.* v. *United States*, 570 F.2d 1197, 1200 (4th Cir.), *cert. denied*, 439 U.S. 821 (1978); *Duncan* v. *Merrill Lynch, Pierce, Fenner & Smith*, 646 F.2d 1020, 1024-27 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981); *General Mill Supply Co.* v. *SCA Serv., Inc.*, 698 F.2d 704, 706 (6th Cir. 1982); *Freeman* v. *Chicago Musical Instrument Co.*, 689 F.2d 715, 718-20 (7th Cir. 1982); *In re Multi-Piece Rim Prod. Liab. Litig.*, 612 F.2d 377, 378 (8th Cir. 1980), *vacated on other grounds sub nom. Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981); *Norton* v. *Tallahassee Memorial Hosp.*, 689 F.2d 938, 941 (11th Cir. 1982); *Ah Ju Steel Co.* v. *Armco, Inc.*, 680 F.2d 751, 752-53 (C.C.P.A. 1982).

trend toward abuse of motions to disqualify attorneys in large civil cases.

a. *Flanagan* rests heavily on factors that arise only in the context of criminal litigation. The *Flanagan* Court re-emphasized that the "'policy [disfavoring pre-judgment appeals] is at its strongest in the field of criminal law,'" 104 S.Ct. at 1054 (quoting *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982)); *see also* 104 S.Ct. at 1057 ("exceptions to the final judgment rule in criminal cases are rare"). Unlike a civil litigant, the criminal defendant is guaranteed a speedy trial by the Sixth Amendment. In addition, "there is a societal interest in providing a speedy trial" in criminal cases. *Id.* at 1054 (quoting *Barker* v. *Wingo*, 407 U.S. 514, 519 (1972)). That societal interest derives, *inter alia*, from a concern for "the prosecution's ability to meet its burden of proof," from "the cost of pretrial detention," from "public anxiety over community safety," and from the community's "strong collective psychological and moral interest in bringing the person responsible to justice"—all of which are adversely affected by undue delay before trial. 104 S.Ct. at 1054. Because of these interests, "the Court has interpreted the requirements of the collateral-order exception to the final judgment rule with the utmost strictness in criminal cases." *Id.* at 1055. But these interests provide no reason to reverse the established rule that disqualification orders in *civil* cases are immediately appealable.

b. Beyond these general considerations, the heart of the analysis in *Flanagan* turns on a factor not present in civil cases. The defendants in *Flanagan* attacked the disqualification of their lawyers on two constitutional grounds: "their Sixth Amendment right to assistance of counsel and . . . their Fifth Amendment due process right to present a common defense through joint counsel." 104 S.Ct. at 1053. It was clear that these constitutional challenges could be asserted on appeal after a con-

viction as grounds to set aside the conviction. The constitutional rights asserted in *Flanagan* are, "like virtually all rights of criminal defendants, merely [rights] not to be convicted under certain circumstances." 104 S.Ct. at 1056.

The *Flanagan* Court did not determine the elements of the showing a criminal defendant would have to establish in order to upset a conviction on either of these grounds. The Court decided that whatever the elements of these constitutional claims, one or more of the conditions for immediate appealability would not be satisfied.[10] If these rights are like other Sixth Amendment rights, "[o]btaining reversal [of a conviction] for violation of such a right [would] not require a showing of prejudice to the defense, since the right reflects constitutional protection to the defendant's free choice independent of concern for the objective fairness of the proceeding." 104 S.Ct. at 1056. On that assumption, "a pretrial order violating the right does not meet the third condition for coverage by the collateral order exception: it is not 'effectively unreviewable on appeal from a final judgment.'" *Id.* The *Flanagan* Court continued:

> If, on the other hand, [the] right is one that is not violated absent some specifically demonstrated prejudice to the defense, a disqualification order [in a criminal case] still falls outside the coverage of the collateral order exception. . . .
>
> On this assumption, a disqualification order, though final, is not independent of the issues to be tried. Its validity cannot be adequately reviewed until trial is complete. . . . In these circumstances the second . . . condition for immediate appealability as a collateral order is not satisfied: the disqualification order does not resolve an "issue completely separate from the merits of the action." [*Id.* at 1056-57].

[10] The three conditions for immediate appealability under the collateral order exception are set forth in *Flanagan*, 104 S.Ct. at 1055:

> . . . First, it "must conclusively determine the disputed question"; second, it must "resolve an important issue completely separate from the merits of the action"; third, it must "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978) (footnote omitted).

The critical point here is that the premise of both of these alternative analyses in *Flanagan* was the existence of a basis—a right rooted in the Constitution—on which a criminal defendant could challenge the disqualification of his counsel as a ground to overturn a criminal conviction. *Id.* at 1055-56. There is, however, no analogous right in the civil context. Pretrial disqualification of counsel does not provide a civil litigant a means to overturn an adverse or unsatisfactory judgment on the merits of a case.

In a civil case, "[t]he fact that counsel was improperly disqualified would not, in itself, be sufficient to warrant a new trial since . . . there is no presumption of prejudice which attaches to such disqualification." *Gough* v. *Perkowski*, 694 F.2d at 1143. And, our research has failed to disclose a single case where a court has even considered, much less approved, a contention that a civil judgment should be overturned because a party's ability to put on his case was prejudiced by an order disqualifying his chosen counsel. The courts that have speculated on such a ground for a post-judgment appeal in a civil case have uniformly concluded that a post-judgment inquiry into prejudice would be "an exercise in futility" for the parties, *Freeman* v. *Chicago Musical Instrument Co.*, 689 F.2d at 719, and "would impose an unrealistic burden on the courts," *Gough*, 694 F.2d at 1144. *Accord, e.g.*, *Armstrong* v. *McAlpin*, 625 F.2d at 441 ("an almost insurmountable burden"); *Duncan* v. *Merrill Lynch*, 646 F.2d at 1025-27. These decisions have recognized that such an appeal would necessarily turn on the subjective and standardless question whether disqualified counsel

would have conducted the trial in a sufficiently superior manner to the performance of substitute counsel as to have altered the outcome of the litigation.[11] Thus, if post-judgment appellate review of an order disqualifying counsel in a civil case were permitted, "[t]he argument in most cases would quickly degenerate into speculation and hindsight, and a proper decision would be extremely difficult, if not impossible, to arrive at." *Gough*, 694 F.2d at 1144.[12]

For these reasons, and for others detailed in the margin,[13] the courts of appeals have uniformly reached the

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[11] Of course, if substitute counsel's performance were so poor as to constitute malpractice, his client would have a basis for a civil tort action against him, not a ground for appeal.

[12] As the *Gough* Court stated:

> Most able lawyers, given a chance to review the results of their initial efforts, could discover ways in which they might have improved on their performance. . . . More important, almost any attorney, knowing the outcome of all the twists and turns of a hotly litigated matter, could tell anyone interested how he would have tried the case and won it had he been the trial lawyer rather than someone less talented or creative. Yet, if appeals are delayed until after trial, courts would be required to deal with precisely that sort of *post hoc* rationalization in every case. [*Id.*]

[13] There are other reasons for concluding that a post-judgment appeal from a disqualification order in a civil case could not adequately protect the rights of the parties involved:

First, unlike a criminal defendant, a plaintiff in a civil case might "prevail," yet obtain a smaller verdict than his chosen counsel would have recovered. That injury, however, could not realistically be reviewed on appeal from a final judgment; to even attempt to measure the effect of an attorney's disqualification on the amount of the relief awarded would "plunge[] [the appellate court] into a morass of speculation." *Gough* v. *Perkowski*, 694 F.2d at 1144-45.

Second, even if his former client prevails, the improperly disqualified attorney "is not likely to find any remedy for the damage to his reputation or to his pocketbook." *Duncan* v. *Merrill Lynch*, 646 F.2d at 1027; *accord, e.g.*, *Freeman* v. *Chicago Musical Instrument*

conclusion stated by the court below (Pet. App. 30a): "[i]t is clear that there can be no effective review at the end of the case." See the cases cited in note 9 *supra*. The reality, recognized by these decisions, is that improper pretrial disqualification of counsel is not a ground for setting aside a judgment in a civil case. *Flanagan* does nothing to alter that conclusion.

Thus, unlike *Flanagan*, this case meets the central requirement for departure from the final judgment rule: "observance of [the rule] would practically defeat the right to any review at all." 104 S. Ct. at 1055 (quoting *Cobbledick* v. *United States*, 309 U.S. 323, 324-325 (1940)). As there is no post-trial challenge to attorney disqualification in a civil case, here, unlike *Flanagan*, the second and third conditions for a pre-trial appeal are clearly met. As to the second condition, the reasoning of the *Flanagan* court has no application here. If an element of establishing deprivation of a constitutional right is prejudice at trial, courts must confront the issue of prejudice in that context, and as *Flanagan* points out, determination of that issue could not be made until after trial.[14] But, in a civil case, prejudice at trial has never been a necessary element of a showing that counsel has been improperly disqualified. The questions in this case, for example, do not depend on a showing of prejudice and are wholly distinct from the issues

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Co., 689 F.2d at 720. Unlike the field of criminal defense, where contingent fees are prohibited, Code of Professional Responsibility DR 2-106(C), many civil cases are undertaken on a contingent basis as a matter of financial necessity. The erroneous disqualification of an attorney in a contingency case, and the substitution of other counsel, may well destroy the disqualified attorney's hope of ever obtaining any compensation for the work, which as here may be of massive quantity, that he has put into a case.

[14] In the circumstances of *Flanagan*, where the defendants claimed a right to be jointly represented by counsel, the possible prejudice at trial could derive from other sources than simply the quality of substitute counsel's trial performance.

at trial. "The issue whether counsel [in a civil case] should be disqualified is completely separate from the merits of the suit." *Gough* v. *Perkowski*, 694 F.2d at 1142. In a civil case, an order disqualifying counsel does "not make any step toward final disposition of the merits of the case and will not be merged in final judgment." *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949). Therefore, a disqualification order in a civil case satisfies the second criterion for immediate appealability.

And, as to the third condition, unlike a criminal case where the Sixth Amendment provides a means to obtain post-conviction review, an order disqualifying counsel in a civil case is effectively unreviewable on appeal from a final judgment. *Flanagan*'s recognition that the Sixth Amendment provides such a means in a criminal case does not affect this practical reality in civil cases.

c. This Court "has long given [the final judgment rule] a practical rather than technical construction." *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. at 546. As we have already discussed, the Court in *Flanagan* was concerned with the deleterious practical effects of permitting pre-trial appeals of disqualification orders in criminal cases. In the civil context, significant harm to the judicial process and to civil litigants would result if pre-trial appeals were *not* permitted.

The court below succinctly described the dangers (Pet. App. 27a, 57a):

> . . .The tactical use of motions to disqualify counsel in order to delay proceedings, deprive the opposing party of counsel of its choice, and harass and embarrass the opponent has become so prevalent in large civil cases in recent years as to prompt frequent judicial and academic commentary. *See, e.g.*, *Board of Education of New York City* v. *Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979); *Williamsburg Wax Museum* v. *Historic Figures, Inc.*, 501 F. Supp. 326, 331 (D.D.C. 1980), *aff'd sub nom. National Souvenir Center, Inc.* v. *Historic Figures, Inc.*, Nos. 82-2329, *et al.*, slip op. at 27-28 (D.C. Cir. Feb. 10, 1984); Crocker, "The Ethics of Moving to Disqualify Opposing Counsel for Conflict of Interest," 1979 Duke L.J. 1310; Comment, 45 U. Chi. L. Rev. 450 (1978). We are aware of no comparable phenomenon in criminal cases. The apparent interest of many civil litigants in delaying adjudication and their use of disqualification motions to help accomplish that end militate in favor of immediate review of orders granting such motions. To insulate from prompt review an erroneous order granting a motion to disqualify counsel would only raise the stakes in this dangerous game.
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> The disruption and delay of proceedings on the merits, such as we have seen in this case, are unhappily foreseeable byproducts of the injudicious use of disqualification motions by opposing counsel. We fear the intrusive potential of such motions would be exacerbated were orders disqualifying counsel not immediately appealable. In complex, costly product liability cases of this type, the plaintiff may have no realistic or comparable alternative to current counsel; counsel are not fungible.

The actions of the petitioner in this case are illustrative. Why did petitioner devote massive and expensive resources to the time-consuming effort to have Allis and Butler disqualified by the lower court? Why has petitioner sought review of the Court of Appeals' decision in this Court? The answer is that petitioner has already gained a lengthy delay in the proceedings on the merits, has become privy to privileged communications between the Kollers and their lawyers, and still retains the hope that it may yet separate the Kollers from the counsel of their choice—the only lawyers on the plaintiffs' side who have done the massive work necessary effectively to try this complex case. If the decision of the court below is

not left to stand, and appellate review in other cases is not permitted, tactics like those of petitioner here will be encouraged. And, the judicial process and civil litigants will pay the price.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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No. 84-127

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARDSON-MERRELL INC.,

Petitioner,

v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

PAGE

1. The Decision Below Wrongly Abolishes as a Matter of Law the Established Authority of the District Courts to Disqualify Counsel for Misconduct 3

2. The Court Below Brushed Aside the Clearly Erroneous Rule and the Abuse of Discretion Standard of Review 4

   a. The Clearly Erroneous Rule 4

   b. The Abuse of Discretion Standard 5

3. The Court Below Wrongly Held That an Attorney May Not Be Disqualified for Releasing Material Which Has Been Ruled Inadmissible With Intent to Circumvent the Ruling and to Prejudice an Opponent 6

4. Attorney Disqualification Orders in Civil Cases Are Not Subject to Interlocutory Appeal Under *Flanagan* v. *United States*, 104 S. Ct. 1051 (1984) 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Board of Education v. *Nyquist*, 590 F.2d 1241 (2d Cir. 1979) 3

Flanagan v. *United States*, 104 S. Ct. 1051 (1984) 7-8

	PAGE
National Hockey League v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976)	3, 5
Roadway Express, Inc. v. *Piper*, 447 U.S. 752 (1980)	3
State v. *Kavanaugh*, 52 N.J. 7, 243 A.2d 225, *cert. denied*, 393 U.S. 924 (1968)	6
Statutes and Rules	
Code of Professional Responsibility	6
Other Authorities	
Reply Brief for Petitioners, *Flanagan* v. *United States*, 104 S. Ct. 1051 (1984)	8

IN THE

Supreme Court of the United States

October Term, 1984

No. 84-127

RICHARDSON-MERRELL INC.,

Petitioner,

v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

This reply brief is submitted on behalf of the petitioner in order to correct the most serious misstatements of fact and distortions of issues in respondents' Brief in Opposition ("Opp.").

In an effort to paper over the freewheeling *de novo* fact-finding of the Court of Appeals, respondents repeatedly assert that the facts in this case are "undisputed" (Opp. 2, 4, 11, 17). This assertion is false. Its falsity is apparent from a simple comparison of the opinions of the District

Court and the Court of Appeals. As to Allis, the District Court found an intent "to thwart a true investigation of a crucial witness in this case" (Pet. 77a), while the Court of Appeals found that his actions "can more easily be understood to reflect a desire to get at the truth and to protect the interest of his client rather than to 'thwart a true investigation' " (Pet. 47a); a sharper conflict between the finding of the District Court and that of the Court of Appeals would be hard to imagine.* The trial court further found that Allis intended to procure a retraction of a statement already given by his secretary to the defendant (Pet. 76a), an issue which even respondents admit was in dispute (Opp. 4 n.2), and listed four facts supporting its findings as to Allis's intent (Pet. 76a-77a), which respondents dispute in a lengthy footnote (Opp. 7-8 n.4). As to Butler, the District Court found an intent to circumvent its orders and to prejudice the defendant (Pet. 78a), a finding which the Court of Appeals went out of its way to question (Pet. 51a),** and made a *de novo* finding of absence of prejudice despite the presence of contrary evidence in the record and in the teeth of a specific request for a remand on this issue (Pet. 12, 22, 51a).

Respondents' argument that the issues presented by the petition herein "have no serious claim to the time and attention of this Court" (Opp. 13; *see also* Opp. 18, 19-20) is based entirely upon respondents' false assertion that the

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* Respondents try to escape this factual conflict by suggesting that the District Court's finding meant only that Allis failed to conduct a true investigation of his client's fraud (Opp. 17). But the District Court's finding will not bear this construction. The District Court found, not merely that Allis had failed to make a true investigation, but also that he had tried to thwart one (Pet. 76a-77a).

** Respondents assert that the Court of Appeals accepted this finding as a premise for analysis (Opp. 12 & n.5, 17), but the Court of Appeals made no such statement (*see* Pet. 51a).

facts assumed by the Court of Appeals were undisputed. In actuality, the facts were sharply disputed, and the Court of Appeals reached the result it desired only by rewriting and ignoring the findings of grave misconduct made by the District Court. If this were permitted, the historic power of the District Courts to supervise the conduct of attorneys in cases before them (*see* Pet. 15 n.* and cases cited) would be deprived of meaning. The defense of the primary role of the District Courts in controlling misconduct in cases before them is indeed worthy of the time and attention of this Court. *See, e.g., Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 764-67 (1980); *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-43 (1976).

1. The Decision Below Wrongly Abolishes as a Matter of Law the Established Authority of the District Courts to Disqualify Counsel for Misconduct

The court below held as a matter of law that counsel may not be disqualified for misconduct unless such misconduct is "likely to infect future proceedings" (Pet. 38a). It made clear that under this standard disqualification would be limited essentially to past and present conflicts of interest, to the exclusion of other forms of misconduct (Pet. 37a-38a). Respondents argue that the rule of law thus adopted by the court below was correct and should not be disturbed by this Court (Opp. 9-10, 14-17).

The sole authority cited in support of this rule of law, either by respondents (Opp. 16) or by the court below (Pet. 37a-38a), is *Board of Education* v. *Nyquist*, 590 F.2d 1241 (2d Cir. 1979). We showed in our petition that the *Nyquist* case did not involve actual misconduct by counsel and therefore has nothing to do with the question presented here

(Pet. 17). Respondents have not attempted to show otherwise. We further showed that the cases involving misconduct by counsel have upheld disqualification without adopting the restrictive standard laid down by the court below (Pet. 15-16 n.**). Respondents attempt to distinguish these cases on their facts (Opp. 16 n.7), but they do not deny that none of these cases adopted the legal standard of the court below. The result is a clear conflict on an issue of law that goes to the heart of the power of Federal trial courts to control proceedings before them.*

2. The Court Below Brushed Aside the Clearly Erroneous Rule and the Abuse of Discretion Standard of Review

a. The Clearly Erroneous Rule

Respondents do not attempt to deny that the findings of fact made by the District Court were entitled to the protection of the clearly erroneous rule (*see* Pet. 17-18; Opp. 17). Instead, respondents argue that the Court of Appeals "was meticulous in following that rule throughout its opinion" and "made additional findings of fact only when the evidence was undisputed" (Opp. 17).

As already shown (*see* pp. 1-2 *supra*), this argument could not be more misleading. The truth is that the Court of Appeals departed sharply from the facts found by the District Court, although it found none of them to be clearly erroneous (Pet. 12-14, 18). In doing so, the Court of Appeals flagrantly violated the clearly erroneous rule. The plainest proof of this is the very fact that the respondents

* Even if the legal standard adopted by the court below were correct, it would not justify the result reached by the court below, because there was no basis for its implicit finding that the misconduct that occurred in this case would not recur (*see* Pet. 6, 23-24 *and* p. 6 *infra*).

have felt compelled to argue that there were no disputed facts in this case.

In light of the blatant violation of the clearly erroneous rule by the Court of Appeals, which infected its entire consideration of the merits of the appeal, the Court should grant the petition for a writ of certiorari, reverse summarily the judgment of the Court of Appeals, and remand for reconsideration on the basis of the facts found by the District Court. *Cf., e.g., National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976). By doing so, the Court will make unmistakably clear that the findings of the District Courts cannot be flung aside in the cavalier manner followed by the Court of Appeals in this case.

b. The Abuse of Discretion Standard

We showed in our petition that there is a conflict among Circuits with respect to the standard of review of disqualification orders, with some Circuits adhering to the abuse of discretion standard and others, such as the Court of Appeals in this case, shifting to a broader standard of review (Pet. 19). Respondents attempt to deny the existence of this conflict among Circuits (Opp. 19-20 & n.8), but, as noted in our petition (Pet. 19 & n.****), it has been recognized by the courts themselves. Respondents also attempt to argue that the Court of Appeals followed the abuse of discretion standard in this case (Opp. 18-19), but the contrary is clear from the opinion of the Court of Appeals (*see* Pet. 20, 34a & n.44).

3. The Court Below Wrongly Held That an Attorney May Not Be Disqualified for Releasing Material Which Has Been Ruled Inadmissible With Intent to Circumvent the Ruling and to Prejudice an Opponent

We showed in our petition (Pet. 21-22) that for purposes of testing the holding of the Court of Appeals that Butler was immune from disqualification as a matter of law, it must be accepted that Butler acted with intent to circumvent the District Court's orders and to prejudice the defendant, and that Butler was guilty of a deliberate violation of the Code of Professional Responsibility. Respondents implicitly admit this (Opp. 12, 14, 17). They make no response to the showing in our petition (Pet. 21-24) concerning the importance of the legal question thus presented and the conflict between the holding of the court below and those of other courts, except to attempt to distinguish *State* v. *Kavanaugh*, 52 N.J. 7, 243 A.2d 225, *cert. denied*, 393 U.S. 924 (1968), on the ground that in that case the disqualified attorney had shown an unwillingness to stay in bounds (Opp. 15 n.6).

In the present case, however, Butler not only manifested an unwillingness to obey the Code of Professional Responsibility in this case, but had a demonstrated prior propensity to use the press to disseminate inadmissible and prejudicial evidence (Pet. 6, 24). Thus Butler was properly disqualified even under the standard suggested by respondents. This Court should reverse the Court of Appeals to make clear that such flagrant evasion of court orders will lead to meaningful sanctions.

4. Attorney Disqualification Orders in Civil Cases Are Not Subject to Interlocutory Appeal Under *Flanagan* v. *United States*, 104 S. Ct. 1051 (1984)

Respondents devote eight pages of their brief (Opp. 20-28) to an argument that the Court should not grant certiorari to decide whether attorney disqualification orders in civil cases are appealable under the principles enunciated in *Flanagan* v. *United States*, 104 S. Ct. 1051 (1984). This argument is without merit.

Respondents first urge that "there is no reason for the Court to review that question at this time" because numerous cases have held disqualification orders in civil cases to be appealable (Opp. 20). Respondents fail to mention that all but two of these cases predated *Flanagan*, and are therefore no more relevant to the question presented than the heavy plurality of appellate courts that held disqualification orders in criminal cases to be appealable before *Flanagan* (*see* Pet. 25-26 and cases cited).

Next, respondents observe that the Court in *Flanagan* referred to the strength of the final judgment rule in criminal cases (Opp. 21). This observation is accurate, but it does not resolve the issue presented by this petition, which is whether the reasoning of this Court in *Flanagan* also applies to civil cases.

The rationale of *Flanagan* was that if an erroneous disqualification order would furnish an automatic basis for reversal of a final judgment, an interlocutory appeal would be unnecessary because the order would be reviewable on appeal from the final judgment; while if a showing of trial prejudice was required for reversal, such a showing would have to await the outcome of the trial. *See* 104 S. Ct. at 1056-57. As shown in our petition (Pet. 26-27), this reasoning is just as applicable to civil cases as it is to criminal cases. Respondents try to distinguish *Flanagan*

on the ground that the right to counsel in criminal cases stems from the Sixth Amendment, which does not apply in civil cases (Opp. 23). This argument overlooks the fact that the rationale of *Flanagan* applies whatever the source of the right being asserted. Respondents also argue that *Flanagan* could not be applied to civil cases because a post-trial showing of prejudice could never be made in civil cases (Opp. 23-25). The same argument was made by the losing parties in *Flanagan*,* and it has no more validity here than it did in *Flanagan*.

Finally, respondents argue that disqualification orders in civil cases should be appealable as a matter of policy (Opp. 26-28). They note that the issue of disqualification was first raised in this case after almost three years of litigation (Opp. 2), and allege (without any record support) that it was raised for delay (Opp. 27). The effrontery of this argument is astounding. The timing of the disqualification issue was not within the control of the defendant or of the District Court. It was dictated by the timing of the misconduct of Butler and Allis. The issue was raised promptly after the misconduct occurred, a fact of which respondents complain elsewhere in their brief (Opp. 6).

Indeed, the factor of delay cuts against respondents' position, not in favor of it. If it had not been for the interlocutory appeal taken by the respondents, this case would by now have been tried in the District Court, with six attorneys remaining to represent the plaintiffs (Pet. 3, 11), a fact nowhere mentioned in respondents' brief. If any prejudice were alleged to have resulted to plaintiffs from the fact that they were represented by six rather than eight attorneys at the trial, that allegation could by now have

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* *See* Reply Brief for Petitioners, pp. 2-3, 8-10, *Flanagan* v. *United States*, 104 S. Ct. 1051 (1984).

been raised on appeal, together with any other claimed basis for appeal. This course would have been vastly more efficient for the parties and the courts than the course which was in fact followed by the respondents.

Conclusion

For the reasons set forth above and in the Petition for a Writ of Certiorari, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Dated: September 25, 1984

Respectfully submitted,

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No. 84-127 (4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

RICHARDSON-MERRELL INC.,

Petitioner,

v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

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19 pp

TABLE OF CONTENTS

PAGE

Petitioner's Supplemental Brief 1

Conclusion 4

Appendix

Decision of the United States Court of Appeals for the Fifth Circuit in *Gibbs v. Paluk* 1a

TABLE OF AUTHORITIES

Cases

Flanagan v. United States, 104 S.Ct. 1051 (1984) 2

Gibbs v. Paluk, Docket No. 84-1033 (5th Cir. Sept. 10, 1984) 1, 2-3

Interco Systems, Inc. v. Omni Corporate Services, Inc., 733 F.2d 253 (2d Cir. 1984) 2, 3

Oneida Indian Nation v. New York, 732 F.2d 259 (2d Cir. 1984) 2

Panduit Corp. v. All States Plastic Manufacturing Co., Docket No. 84-569 (Fed. Cir. Sept. 25, 1984) 1, 3

IN THE

Supreme Court of the United States

October Term, 1984

No. 84-1

RICHARDSON-MERRELL INC.,

Petitioner,

v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

Petitioner respectfully files this Supplemental Brief in accordance with Rule 22.6 to bring to the attention of the Court two very recent Court of Appeals decisions not available at the filing of Petitioner's Reply Brief: *Gibbs v. Paluk*, Docket No. 84-1033 (5th Cir. Sept. 10, 1984), and *Panduit Corp. v. All States Plastic Manufacturing Co.*, Docket No. 84-569 (Fed. Cir. Sept. 25, 1984).* A square

* Copies of both of these decisions were lodged with the Clerk of this Court under cover of Petitioner's letter of October 5, 1984. In light of the exceptional importance of the Fifth Circuit's decision in *Gibbs*, this opinion is reproduced in the Appendix herein.

conflict has now developed among Circuits with respect to the fourth question presented by the petition herein—whether an order disqualifying counsel in a civil case is subject to interlocutory appeal in light of the holding of this Court in *Flanagan v. United States*, 104 S.Ct. 1051 (1984).

Prior to these two most recent decisions, only three post-*Flanagan* decisions had touched upon the appealability of attorney disqualification orders in civil cases. In *Oneida Indian Nation v. New York*, 732 F.2d 259, 261 (2d Cir. 1984), the Second Circuit stated that *Flanagan* "certainly calls into question the continuing validity of the rule permitting interlocutory appeal of a disqualification order entered in a civil case." In *Interco Systems, Inc. v. Omni Corporate Services, Inc.*, 733 F.2d 253, 255 (2d Cir. 1984), however, the Second Circuit decided to continue to allow such appeals "until the issue is otherwise specifically determined by the Supreme Court." The third previous post-*Flanagan* decision on this issue was that of the Court below, which attempted to distinguish civil disqualification orders from the criminal disqualification orders held non-appealable in *Flanagan* (*see* Pet. 27-28; Reply 7-9).

In one of the two very recent opinions, *Gibbs v. Paluk*, Docket No. 84-1033 (5th Cir. Sept. 10, 1984) (2-1), the Fifth Circuit, in an opinion by Judge Rubin, held that civil disqualification orders, like criminal disqualification orders, are not appealable under *Flanagan* because the analysis of *Flanagan* "appears equally applicable to criminal and civil cases" (4a). The Fifth Circuit expressly rejected the rationale of the Court below and stated:

> "We recognize that we hereby create a conflict in the rulings of the circuit courts. The issue is recurrent and important, however, and its final resolution can be accomplished only by a definitive ruling from the Supreme Court, absent the most unlikely event of a statutory change." (10a.)

The second recent decision, *Panduit Corp. v. All States Plastic Manufacturing Co.*, Docket No. 84-569 (Fed. Cir. Sept. 25, 1984), agreed with the Second Circuit in *Interco* and with the Court below.

Thus there is now a clear conflict among Circuits on the appealability of attorney disqualification orders in civil cases. This important and frequently recurring question calls for resolution by this Court.

Conclusion

For the reasons set forth above and in the Petition for a Writ of Certiorari, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Dated: October 6, 1984

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APPENDIX

Decision of the United States Court of Appeals for the Fifth Circuit in *Gibbs v. Paluk*

PATT GIBBS and TAMARA UTENS,

Plaintiffs-Appellees,

v.

BRUNO PALUK, et al.,

Defendant,

THE ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS,

Defendant-Appellant.

No. 84-1033

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

Sept. 10, 1984.

Appeal from the United States District Court for the Northern District of Texas.

Before:

RUBIN, JOLLY, and DAVIS,

Circuit Judges.

ALVIN B. RUBIN, *Circuit Judge:*

Whether a district court order disqualifying counsel is immediately appealable is our first concern in considering this motion to stay proceedings pending appeal in a civil suit. The Supreme Court has held that an order disqualifying counsel in a criminal case is not final in effect and therefore not appealable. The analysis in that decision

requires us to change our course in civil cases and to hold that we lack jurisdiction to entertain an interlocutory appeal. Accordingly, we deny the stay.

I.

Patt Gibbs and Tamara Utens are members of a union, the Association of Professional Flight Attendants (APFA). Gibbs had been the union president and Utens its secretary-treasurer. They sued the union challenging both its participation in another law suit and various other actions taken by the union's present officers and directors. The same lawyer filed two answers, one on behalf of APFA and the other on behalf of those of the defendant union officials who had not opposed its participation in the earlier suit. He also filed a motion seeking leave for the union to intervene in the counts brought against the individual defendants.

Gibbs and Utens countered with a motion to disqualify the lawyer. They contended that his real or apparent favor toward the union officials for whom he had appeared indicated his predisposition against the union faction who had filed this suit and interfered with his continued representation of the union. In addition, they argued that his dual representation created the risk of breach of confidentiality. The lawyer filed a motion seeking to withdraw from further representation of the individual defendants and an amended motion to limit the union's intervention attempt to those claims in the individual counts that concerned the union.

The district court held that, to avoid the appearance of impropriety, union counsel must avoid any form of direct

affiliation with any union faction. Because he had failed to maintain such impartiality, the district court disqualified him from representing either the union or the individual defendants. The union alone appeals, seeking a stay of the order pending appeal.

II.

Until final judgment, the orders of a district court are not appealable.[1] Some judgments not final in form, however, are sufficiently final in effect to be immediately appealable. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978). An order in a civil case denying a motion to disqualify counsel does not satisfy the finality requisites of *Cohen,* and hence is not appealable. *Firestone Tire and Rubber Co. v. Risjord.*[2] In *Firestone,* however, the Court reserved the question whether orders *granting* motions to disqualify counsel in either civil or criminal cases are immediately appealable.[3]

The Supreme Court recently answered one of the reserved questions. In *Flanagan v. United States,*[4] the Court unanimously held that a disqualification order in a criminal case was not appealable until after final judgment in the case. The facts did not raise and the opinion

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1. 28 U.S.C. § 1291. There are a few exceptions not pertinent here.

2. 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981).

3. *Firestone Tire and Rubber Co. v. Risjord, supra,* 449 U.S. at 372 n.8, 101 S.Ct. at 672 n.8.

4. ___ U.S. ___, 104 S.Ct. 1051, 79 L.Ed.2d 288 (1984).

did not discuss the issue of the immediate appealability of a disqualification order in a civil matter. Thus, the Court has not yet expressly ruled on the issue presented here.

Between *Firestone* and *Flanagan,* we held in three cases that such an order in a civil case is appealable as soon as it is entered.[5] A number of other circuit courts have reached the same conclusion.[6]

The pages of the Federal Reporters already contain thorough discussion of whether disqualification orders should be treated differently in criminal than in civil cases. It would be pedantic again to recite those pros and cons; for the result in this case is determined by application of the analysis announced by the Supreme Court in *Flanagan,* an analysis that appears equally applicable to criminal and civil cases.

The requirements of the collateral order exception to the finality rule, as articulated by the Court in *Coopers & Lybrand,* are that: (1) the order "must conclusively determine the disputed question"; (2) it must "resolve an

5. *Duncan v. Merrill Lynch, Pierce, Fenner & Smith,* 646 F.2d 1020 (5th Cir.), *cert. denied,* 454 U.S. 895, 102 S.Ct. 394, 70 L.Ed.2d 211 (1981); *Cossette v. Country Style Donuts, Inc.,* 647 F.2d 526, 528 n.2 (5th Cir. 1981); *In re Corrugated Container Antitrust Litigation,* 659 F.2d 1341, 1344 (5th Cir. 1981).

6. *See, e.g., Gough v. Perkowski,* 694 F.2d 1140, 1142-45 (9th Cir. 1982); *Groper v. Taff,* 717 F.2d 1415, 1417 (D.C. Cir. 1983); *Freeman v. Chicago Musical Instrument Co.,* 689 F.2d 715, 718-21 (7th Cir. 1982); *Ah Ju Steel Co. v. Armco, Inc.,* 680 F.2d 751, 752-53 (C.C.P.A. 1982); *In re Coordinated Pre-Trial Proceedings in Petroleum Products Antitrust Litigation,* 658 F.2d 1355, 1156-58 (9th Cir. 1981), *cert. denied,* 455 U.S. 990, 102 S.Ct. 1615, 71 L.Ed.2d 850 (1982); *Glueck v. Jonathan Logan, Inc.,* 653 F.2d 746, 748 n.2 (2d Cir. 1981).

important issue completely separate from the merits of the action"; and (3) it must "be effectively unreviewable on appeal from a final judgment."[7] These requirements are conjunctive: failure of any one results in failure of jurisdiction.

Only the Ninth Circuit had, before *Flanagan,* distinguished between civil and criminal cases, basing its decision on analysis of the third element, eventual reviewability. In *United States v. Greger,*[8] it held that disqualification orders in criminal cases are effectively reviewable on appeal because the presumption of prejudice, which is unavailable in civil cases, relieves the criminal defendant of the "almost insurmountable burden" of proving that the case was lost for want of chosen counsel.[9] In *Flanagan,* however, the Court stated "the *second Coopers & Lybrand* condition—that the order be truly collateral—is not satisfied if petitioners' asserted right [to counsel of their choice] is one requiring prejudice to the defense for its violation."[10] The Court continued, "a disqualification order, though final, is not independent of the issue to be tried" because "[i]ts validity cannot be adequately reviewed until trial is complete . . . . The effect of the disqualification on the defense, and hence whether the asserted right has been violated,

7. 437 U.S. 463, 468, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1984) (footnote omitted).

8. 657 F.2d 1109, 1110-1113 (9th Cir. 1981).

9. *See Gough v. Perkowski, supra,* at 1142-44 (quoting *Armstrong v. McAlpin,* 625 F.2d 433 at 440-41 (1980)).

10. ___ U.S. ___, ___, 104 S.Ct. 1051, 1056-57, 79 L.Ed.2d 288 (emphasis added).

cannot fairly be assessed until the substance of the prosecution's and defendant's cases is known."[11]

Before *Flanagan,* the lower courts had regarded disqualification orders in civil cases as presenting considerations that did not require them to become "enmeshed in the factual and legal issues comprising [the litigant's] cause of action."[12] They did not consider disqualification orders "of such a nature as to permit fair assessment *only* after trial. . . ."[13] And no court had held that the second *Coopers & Lybrand* element was not satisfied in either criminal or civil cases.

Two circuits have examined the impact of *Flanagan* on the immediate appealability of orders disqualifying counsel. In two post-*Flanagan* decisions, the Second Circuit observed first that the Supreme Court's opinion cast doubt on the immediate appealability of those orders,[14] but later declined to reexamine its rules on appealability of such orders "until the issue is otherwise specifically determined by the Supreme Court."[15] The court instead adhered to the careful analysis of the problem it had undertaken en banc in *Armstrong v. McAlpin.*[16]

11. *Id.* at 1057.

12. *Coopers & Lybrand, supra,* 437 U.S. at 469, 98 S.Ct. at 2458. *See, e.g., Gough v. Perkowski, supra,* 694 F.2d at 1142.

13. *In re Coordinated Pre-Trial Proceedings in Petroleum Products Antitrust Litigation, supra,* 658 F.2d at 1357 (emphasis added).

14. *Oneida Indian Nation of Wisconsin v. New York,* 732 F.2d 259 (2d Cir. 1984).

15. *Interco Systems, Inc. v. Omni Corporate Services, Inc.,* 733 F.2d 253, 255 (2d Cir. 1984).

16. 625 F.2d 433, 437-41 (2d Cir. 1980) (en banc), *vacated on other grounds,* 449 U.S. 1106, 101 S.Ct. 911, 66 L.Ed.2d 835 (1981) (holding

The District of Columbia has also upheld the appealability of disqualification orders. In *Koller v. Richardson-Merrell, Inc.,*[17] the court noted the Supreme Court's emphasis in *Flanagan* on the importance of the final judgment rule in criminal cases, and held that each of the three *Coopers & Lybrand* requirements were met in a civil case. Only its analysis of the second—whether disqualification orders are independent of the merits—need concern us here. The court focused on the statement in *Flanagan* that the order's "validity cannot be adequately reviewed until trial is complete,"[18] and concluded that the Court intended to limit its analysis to "considerations that are peculiar to criminal cases and do not extend to the civil context." *Koller,* 737 F.2d at 1053. The D.C. Circuit offered two possible explanations: First, the sixth amendment basis of the defendant's claim may have "led the Court to equate the 'validity' of a disqualification order with the absence of a sixth amendment violation." *Id.* at 1053. Second, the particularly "strong shared interest of the defendant, the state and the public in a speedy adjudication of guilt or innocence in criminal cases" might have prompted the Court to prohibit interlocutory appeals when the defendant might be acquitted or might be unable to demonstrate prejudice.

Despite these decisions, we feel constrained to apply the Court's *Flanagan* analysis to disqualification orders in civil cases. Although the Court stressed the importance of

grants of disqualification motions in civil cases immediately appealable, but anticipating Supreme Court's *Firestone* decision by holding denials of such motions not appealable).

17. 737 F.2d 1038 (D.C. Cir. 1984).

18. *Flanagan,* 104 S.Ct. at 1057.

finality in criminal trials and the consequent need to avoid trial interruptions, we see no basis for concluding that disqualification orders in civil trials lend themselves more readily to consideration apart from the merits of the litigation than such orders in criminal cases. In *Firestone,* the Court reasoned, "[t]he propriety of the district court's denial of a disqualification motion will often be difficult to assess until its impact on the underlying litigation may be evaluated, which is normally only after final judgment."[19] We declined, in *Duncan,* to apply this reasoning to grants of disqualification motions:

> When a district court grants disqualification, the effect of the court's action is immediate and measurable. The party opposing the motion is abruptly deprived of his counsel, and, provided he desires to proceed with his action, the litigation is disrupted while he secures new counsel. In this situation, the reviewing court need not wait until final judgment to evaluate the impact of the lower court's order.[20]

This analysis related to the reviewability of the order on appeal after final judgment—the third *Coopers & Lybrand* element—not the separateness of the issue from the merits.[21] *Flanagan,* however, requires us to apply these considerations to the second element. We differ with the

19. 449 U.S. at 377, 101 S.Ct. at 675.

20. 646 F.2d at 1027.

21. The Court in *Firestone* assumed the second element was decided, 449 U.S. at 376, 101 S.Ct. at 674. We held in *Duncan* that it was. 646 F.2d at 1029 n.9.

D.C. Circuit about the conclusions to be drawn from the Court's use of the word "validity." The disruption of the proceedings occasioned by disqualification of counsel is no less immediately apparent in a criminal case than it is in civil litigation. We understand the Supreme Court to have said that, if the defendant must show prejudice, this impact cannot be measured until the trial has concluded. Whether a criminal defendant is guilty or innocent, and what sentence should be imposed if he is found guilty, is no more or less independent of the grounds for attorney disqualification than is a civil litigant's right to judgment.

Policy considerations may be irrelevant to determining whether the second *Coopers & Lybrand* requirement has been satisfied. If they are to be weighed, however, some effect must be given to the patently stronger interest of the criminal defendant in being represented by counsel of his choosing. If concerns about speedy resolution of criminal cases outweigh that interest, and somehow establish such a nexus between the disqualification question and the merits as to defeat appealability, then even-handedness forbids placing the civil litigant in a better position than the criminal defendant. The interests of the lawyer who is barred from participating in either type of case appear to be irrelevant in deciding the "finality in effect" of the order on the litigant; but, even if that is to be considered, we see no reason why the potential fees and prestige arising from handling the civil case should be more highly regarded than the prospects of the criminal-case retainer.

Whether orders denying disqualification in both civil and criminal cases are appealable has been decided.

Whether orders granting disqualification in criminal cases are appealable has been decided. It would be anomalous to hold that in this domain there remains one exception: disqualification in a civil case is different. Neither language, nor logic, nor policy appears to us to warrant such an oddity. Therefore, we regard the rule announced in *Duncan* to have been superseded by *Flanagan,* despite *Flanagan*'s professed restraint, and accordingly hold that disqualification orders are not appealable under the collateral-order exception to the finality requirement.

We recognize that we hereby create a conflict in the rulings of the circuit courts. The issue is recurrent and important, however, and its final resolution can be accomplished only by a definitive ruling from the Supreme Court, absent the most unlikely event of a statutory change.

The request for a stay is DENIED.

E. GRADY JOLLY, *Circuit Judge,* dissenting:

I respectfully dissent.

I find the reasoning of *Koller v. Richardson-Merrell,* 737 F.2d 1038 (D.C. Cir. 1984) persuasive, and am convinced that orders disqualifying counsel in civil cases are sufficiently distinguishable in character and effect from such orders in criminal cases as to render inapplicable the reasoning and holding of *Flanagan v. United States,* ____ U.S. ____, 104 S.Ct. 1051, 79 L.Ed.2d 288 (1984). Indeed, it seems to me that the reasoning of

Flanagan encourages us to draw distinctions between civil litigation and criminal prosecutions for the purposes of analyzing the immediate appealability of counsel disqualification orders. The distinction between criminal prosecutions and civil litigation stems from the emphasis criminal prosecutions place on the rights of the individual defendant which often control the *final* judgment in the case. Because in criminal prosecutions, this "respect for the individual is the lifeblood of the law,"[1] it is inseparable from consideration of the final judgment on the substantive merits of the case. The criminal defendant's right to a speedy trial and his right to effective counsel, the rights most directly implicated here, are but two manifestions of this respect for the individual which became intermeshed in the reviewability of final judgment in the criminal, but not the civil case.

Consequently, it is my view that unlike the counsel disqualification order in a criminal case, such an order in a civil case presents for appeal each and every criterion necessary to create an exception to the final judgment rule under *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). We can, on this appeal before us, conclusively determine the disputed question of whether counsel was properly disqualified; second, the important issue for determination, dissimilar to such an order disqualifying counsel in a criminal case, is completely separate from the merits of this action; and, finally, also distinguishable from a criminal case, the disputed question here would not be

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1. *Illinois v. Allen,* 397 U.S. 337, 350-51, 90 S.Ct. 1057, 1064, 25 L.Ed.2d 353 (1970) (Brennan, J., concurring).

effectively reviewable on appeal from a final judgment in this case because, first, the defendant has no constitutional right to effective counsel and hence no presumption of prejudice inures in his favor, and, second, prejudice from an order disqualifying counsel is virtually impossible to prove on review of a final judgment on the substantive merits in a civil case.

I cannot better explain the reasoning for my dissent further than has Judge Wald in *Koller.* For these and those reasons, I respectfully dissent.

Supreme Court, U.S.
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No. 84-127

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OCTOBER TERM, 1984

RICHARDSON-MERRELL INC.,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO PETITIONER'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

	Page
Respondents' Supplemental Brief	1
Conclusion	3

TABLE OF AUTHORITIES

CASES

Gibbs v. *Paluk*, No. 84-1033 (C.A. 5, Sept. 10, 1984)	1-2
University of Texas v. *Camenisch*, 451 U.S. 390 (1981)	2

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RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO PETITIONER'S SUPPLEMENTAL BRIEF

On October 6, 1984, petitioner filed a Supplemental Brief in support of its petition for a writ of certiorari, contending that the Fifth Circuit's decision in *Gibbs v. Paluk*, No. 84-1033 (C.A. 5, Sept. 10, 1984), creates a conflict among the Circuits on the fourth question presented in its petition—whether an order disqualifying counsel in a civil case is subject to interlocutory appeal. Because petitioner overstates the effect of the Fifth Cir-

cuit's decision, respondents submit this Supplemental Brief.

In asserting that "there is now a clear conflict among Circuits on the appealability of attorney disqualification orders in civil cases," Pet. Supp. Br. at 3, petitioner fails to note that the September 10 decision in *Gibbs v. Paluk* was *not* the final decision of the Fifth Circuit. Rather, the opinion cited by petitioner was issued by a motions panel, without the benefit of oral argument, on a motion to stay further proceedings in the District Court pending appeal. That the Court's opinion was limited to this interlocutory aspect of the case is established by the Court's holding: "The request for a stay is DENIED." Pet. Supp. Br. App. 10a.

On October 5, 1984, the Clerk of the Fifth Circuit advised us that *Gibbs v. Paluk* is still pending before that Court, and that the parties have filed a Motion for Clarification and a Motion to Dismiss Appeal following the motions panel's decision. Under the Fifth Circuit's rules and internal operating procedures, it is not clear whether the same panel that denied the request for a stay will also rule on the pending motions and the merits of the appeal. In addition, counsel for the appellant in *Gibbs v. Paluk* has advised us that, should the Fifth Circuit ultimately dismiss his appeal for the reasons stated by Judge Rubin in denying the request for a stay, he may seek rehearing and suggest rehearing en banc.

Thus, the September 10 decision in *Gibbs v. Paluk* does not necessarily represent the final decision of the Fifth Circuit on the immediate appealability of attorney disqualification orders in civil cases. Cf. *University of Texas v. Camenisch*, 451 U.S. 390 (1981). To the extent that that decision creates a conflict with the decision of the Court below—a conflict limited only to the fourth question presented in the petition—the conflict may well prove temporary.

Certainly, the asserted conflict does not in any way justify plenary review of petitioner's first three questions presented. And, because the conflict on the fourth question presented may resolve itself without this Court's intervention, it does not merit this Court's plenary consideration at this time.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in respondents' Brief in Opposition, the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

(10)

No. 84-127

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARDSON-MERRELL INC.,

Petitioner,

v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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TABLE OF CONTENTS

	PAGE
Relevant Docket Entries in the Court of Appeals	1
Relevant Docket Entries in the District Court	4
Order of the District Court Excluding Testimony Regarding Thalidomide and MER/29 Filed October 19, 1982	13
Clerk's Office Notification of Trial Date Dated December 7, 1982	14
* Excerpts from Defendant's Proposed Questions for Voir Dire Examination Filed December 15, 1982	15
Affidavit of Ogden N. Lewis in Support of Defendant's Motion for Permission to Take Additional Expedited Discovery Filed December 29, 1982	17
Exhibit A—Telephone Message Received by Davis Polk & Wardwell	19
Exhibit B—Telephone Message Received by Davis Polk & Wardwell	20
Exhibit G—Letter of Ogden N. Lewis to the District Court	21
Exhibit 21 to Defendant's Memorandum of Law With Respect to Issues of Attorney-Client Privilege—Letter of James G. Butler to the District Court	23
Attachment—Typed Statement of Krystyna Janowski	26
Second Attachment—Handwritten Statement of Krystyna Janowski	28

* Parts of the record first designated in whole or part by Respondents for inclusion in the Joint Appendix.

PAGE

Exhibit 22 to Defendant's Memorandum of Law with Respect to Issues of Attorney-Client Privilege—Letter of Carl J. Schuck to the District Court 29

Excerpt from the United States District Court for the District of Columbia Hearing Transcript of January 4, 1983 31

* Plaintiffs' Motion to Disqualify Counsel for Witness Because of Conflict of Interest Filed January 7, 1983 32

* Excerpts from Plaintiffs' Memorandum of Law in Support of Motion to Disqualify Counsel for Witness Filed January 7, 1983 33

Excerpts from Declaration of Richard M. Coleman Dated January 3, 1983 33

Affidavit of James G. Butler Dated January 5, 1983 36

Affidavit of Richard Daum Dated January 5, 1983 39

Affidavit of William Joseph Canalez Dated January 5, 1983 40

* Excerpts from Exhibits Annexed to Plaintiffs' Opposition to Defendant's Motion to Take Depositions of Plaintiffs' Representatives Filed January 10, 1983—Declaration of Rear Admiral G. J. B. Crabb, Ret. Dated January 7, 1983 45

Attachment to Declaration of Rear Admiral G. J. B. Crabb, Ret. Dated January 7, 1983 46

* Second Supplemental Declaration of Richard M. Coleman Filed January 10, 1983 48

* Order of the District Court Denying Plaintiffs' Motion to Disqualify Counsel for Witness Filed January 11, 1983 49

* Parts of the record first designated in whole or part by Respondents for inclusion in the Joint Appendix.

PAGE

* Order of the District Court Requiring Arthur N. Cohen or George Kokus to Appear Filed January 12, 1983 .. 50

Excerpt from United States District Court for the District of Columbia Hearing Transcript of January 12, 1983 51

Excerpts from Deposition of Krystyna Janowski Held on January 12, 1983 52

Memorandum Opinion of the District Court Excluding Evidence of Cordova and Sand Filed January 17, 1983 59

Order of the District Court Excluding Evidence on Cordova and Sand Filed January 17, 1983 63

* Affidavit of Carol Freeman Filed January 18, 1983 64

Excerpts from United States District Court for the District of Columbia Hearing Transcript of January 18, 1983 65

Memorandum Opinion of the District Court Affirming Ruling Regarding Attorney-Client Privilege Filed January 19, 1983 68

* Order of the District Court Affirming Ruling Regarding Attorney-Client Privilege Filed January 19, 1983 73

* Excerpts from Deposition of George Barnes Held on January 25, 1983 74

* Excerpts from Continued Deposition of Krystyna Janowski Held on January 27, 1983 75

Excerpts from Exhibit 76 81

* Parts of the record first designated in whole or part by Respondents for inclusion in the Joint Appendix.

PAGE

Memorandum Opinion of the District Court Excluding DERs Filed January 31, 1983 84

Order of the District Court Excluding DERs Filed January 31, 1983 90

Excerpts from United States District Court for the District of Columbia Hearing Transcript of January 31, 1983 91

* Defendant's Memorandum in Support of Motion for Imposition of Sanctions on Plaintiffs' Counsel Filed February 7, 1983 95

Affidavit of Ogden N. Lewis in Support of Motion for an Order Imposing Sanctions on Plaintiffs' Counsel Filed February 7, 1983 96

Excerpt from Exhibit A—Simulated DER of Marco Cordova 98

Exhibit B—*Washington Post* Article by Morton Mintz Dated February 7, 1983 129

* Excerpt from United States District Court for the District of Columbia Hearing Transcript of February 7, 1983 131

Excerpt from United States District Court for the District of Columbia Hearing Transcript of February 9, 1983 131

Excerpts from United States District Court for the District of Columbia Hearing Transcript of February 10, 1983 132

* Parts of the record first designated in whole or part by Respondents for inclusion in the Joint Appendix.

PAGE

Plaintiffs' Response to Defendant's Motion for Sanctions Filed February 14, 1983 133

Exhibit C—Letter from James Butler to Commissioner Hayes 134

Exhibit C—Continued—Letter from James Butler to Merrell Dow Pharmaceutical Company 135

Exhibit D—Affidavit of James G. Butler 137

Excerpts from United States District Court for the District of Columbia Hearing Transcript of February 17, 1983 138

* Letter of Carl J. Schuck to The Honorable Gerard D. Reilly Dated February 25, 1983 140

* Excerpts from Deposition of Patrick Ryan Held February 26, 1983 141

* Plaintiffs' Submission in Support of Objection to Evidentiary Hearing on Fraud on the Court Filed March 2, 1983 142

Excerpts from Exhibit 2– Selected Medical Records of Mrs. Cynthia Koller 144

Excerpts from Exhibit 3—Selected Medical Records of Anne Koller 149

Excerpts from Exhibit 4—Selected Personnel Records of Mrs. Cynthia Koller 152

* Excerpts from United States District Court for the District of Columbia Hearing Transcript of March 2, 1983 153

* Parts of the record first designated in whole or part by Respondents for inclusion in the Joint Appendix.

PAGE

Excerpts from United States District Court for the District of Columbia Hearing Transcript of March 7, 1983, 10:00 a.m. Session 155

Excerpts from United States District Court for the District of Columbia Transcript of March 7, 1983, 3:30 p.m. Telephone Conference Call 158

Order of the District Court Setting Evidentiary Hearing Filed March 8, 1983 160

Excerpts from United States District Court for the District of Columbia Hearing Transcript of March 8, 1983..... 162

* Exhibit 17 to Plaintiffs' Petition for a Writ of Mandamus Filed with the United States Court of Appeals for the District of Columbia Circuit on March 9, 1983 .. 167

* Exhibit 18 to Plaintiffs' Petition for a Writ of Mandamus Filed with the United States Court of Appeals for the District of Columbia Circuit on March 9, 1983 .. 168

* Excerpts from United States District Court for the District of Columbia Evidentiary Hearing Transcript of March 10, 1983 170

Testimony of Cynthia Koller
Direct 170

Testimony of Nicholas R. Allis
Direct 170
Cross..... 187
Redirect 188
Questioning by the Court 188

* Parts of the record first designated in whole or part by Respondents for inclusion in the Joint Appendix.

PAGE

Testimony of Allen T. Eaton
Direct 198

Testimony of Floyd T. Humphries, Jr.
Direct 199
Cross..... 205
Questioning by the Court 208

* Excerpts from United States District Court for the District of Columbia Evidentiary Hearing Transcript of March 11, 1983 211

Testimony of James G. Butler
Direct 211
Cross..... 220

* Excerpts from United States District Court for the District of Columbia Evidentiary Hearing Transcript of March 14, 1983 222

Testimony of James G. Butler
Questioning by the Court 222
Redirect 223

* Excerpts from United States District Court for the District of Columbia Evidentiary Hearing Transcript of March 15, 1983 225

Testimony of Nicholas R. Allis
Direct 225
Questioning by the Court 228
Redirect 244

Order to Show Cause of the District Court Filed April 29, 1983 246

Plaintiffs' Memorandum Filed May 27, 1983 Regarding the District Court's Order to Show Cause 248

* Parts of the record first designated in whole or part by Respondents for inclusion in the Joint Appendix.

PAGE

Affidavit of James G. Butler Dated May 24, 1983 in Support of Plaintiffs' Memorandum Regarding the District Court's Order to Show Cause..... 249

Exhibit 1—Letter of James G. Butler to Commissioner Hayes 253

Exhibit 1A—U.S. Post Office Express Mail Receipt 254

• Defendant's Memorandum Re: The Calling of Krystyna Janowski and for an Expanded Evidentiary Hearing Filed May 27, 1983..... 255

• Excerpts from United States District Court for the District of Columbia Order to Show Cause Hearing Transcript of May 31, 1983..... 258

Testimony of The Hon. Francis F. Van Dusen
Direct 258

Testimony of John K. Van de Kamp
Direct 258

Testimony of Aerial C. Hilton
Redirect 259

Testimony of Michael J. Lightfoot
Direct 259

Testimony of James Philip Conn
Direct 260
Cross..... 260

Testimony of Dr. Sydney W. Gross
Direct 260
Cross..... 261

Supplemental Affidavit of Ogden N. Lewis Dated June 8, 1983 262

• Parts of the record first designated in whole or part by Respondents for inclusion in the Joint Appendix.

PAGE

Exhibit A—Affidavit of Richard A. Black Dated June 2, 1983..... 263

Attachment—*Arizona Republic* Article Dated September 7, 1975..... 267

Exhibit F—Transcript of Tape-Recorded Conversation Held on 12/27/82 of Krystyna Janowski, Floyd Humphries and Nicholas Allis..... 269

• Letter of Ogden N. Lewis to The Honorable Norma Holloway Johnson Dated June 9, 1983..... 295

News Release Annexed to Letter 296

• Excerpts from United States District Court for the District of Columbia Order to Show Cause Hearing Transcript of June 21, 1983..... 298

• Excerpts from United States District Court for the District of Columbia Order to Show Cause Hearing Transcript of June 30, 1983..... 300

Testimony of Nicholas R. Allis
Direct 300
Cross..... 303

Testimony of David Austern
Direct 305
Cross..... 310
Redirect 310
Recross..... 312

Testimony of Thomas Lumbard
Direct 313
Cross..... 321
Redirect 322

• Parts of the record first designated in whole or part by Respondents for inclusion in the Joint Appendix.

PAGE

Excerpts from United States District Court for the District of Columbia Hearing Transcript of July 1, 1983 323

* Excerpts from Exhibits to Supplement to Testimony of Nicholas R. Allis and James G. Butler Dated August 27, 1983 325

* Excerpts from Deposition of Larry J. Larsen Held on September 15, 1983..... 330

* Excerpts from Plaintiffs' Motion for Stay of All Proceedings Dated January 11, 1984 330

Affidavit of Cynthia M. Koller Dated January 10, 1984..... 331

* Transcript Excerpts from Testimony of Krystyna Janowski, California Unemployment Insurance Appeals Board, *In the Matter of Krystyna Janowski*, LA 7567, Dated May 25, 1983, P.M. Session 332

* Order of the Court of Appeals Staying All Proceedings and Setting Expedited Consideration Filed January 27, 1984 339

Letter of James Butler to Morton Mintz Dated January 28, 1983 340

Order of the Supreme Court Allowing Certiorari Dated October 15, 1984..... 342

* Parts of the record first designated in whole or part by Respondents for inclusion in the Joint Appendix.

PET. APP. PAGE

The following opinions and orders have been omitted in printing the Joint Appendix because they appear in the Appendix to the Petition for a Writ of Certiorari:

Opinion of the Court of Appeals Dated May 29, 1984 1a

Amendments to the Opinion of the Court of Appeals Dated July 16, 1984 ..... 70a

Opinion of the District Court Dated January 6, 1984 72a

Order of the District Court Dated January 6, 1984 .. 79a

Notice of the Court of Appeals Entry of Judgment Dated May 29, 1984..... 81a

Order of the Court of Appeals Denying Petition for Rehearing Dated July 17, 1984..... 82a

Order of the Court of Appeals Denying Petition for Rehearing *En Banc* Dated July 17, 1984..... 84a

Relevant Docket Entries in the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5039

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, et al.

JAMES G. BUTLER, NICHOLAS R. ALLIS and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,

Appellants,

v.

RICHARDSON-MERRELL, INC., a Delaware Corporation,

Appellee.

DATE	FILINGS—PROCEEDINGS
01-23-84	Copy of notice of appeal and docket entries from Clerk, District Court.
01-23-84	Appellants' emergency motion for stay of all proceedings pending appeal of order disqualifying trial attorneys.
01-25-84	Appellee's opposition to appellants' motion for stay.
01-27-84	Per curiam order that appellants' emergency motion for stay of proceedings pending appeal of order disqualifying certain trial attorneys and request for expedited consideration of appeal is granted and further proceedings in the District Court are stayed pending further order of this Court; and that appellants' request for expedited appeal is granted and the Clerk is

DATE	FILINGS—PROCEEDINGS
	directed to schedule argument during the March 1984 sitting period of the Court. • • • •
03-01-84	Appellee's suggestion of issue regarding jurisdiction
03-07-84	Appellants' response to appellee's suggestion of issue regarding jurisdiction
03-09-84	Clerk's order, sua sponte, that counsel for the parties herein shall file, in typewritten form not to exceed ten pages, memoranda dealing with appealability of an attorney disqualification order in light of holding of the Supreme Court of the United States in Flanagan v. United States. • • • •
03-19-84	Appellants' memorandum on the question of appellate jurisdiction pursuant to 03-09-84 order
03-19-84	Appellee's memorandum concerning appellate jurisdiction pursuant to 03-09-84 order
03-22-84	ARGUED before Wald and Mikva, CJs and USDC Judge Charles R. Richey
05-29-84	Opinion for the Court filed by Circuit Judge Wald.
05-29-84	Concurring opinion filed by District Judge Richey.
05-29-84	Judgment by this Court that the judgment of the District Court appealed from in this cause is hereby reversed and this case is remanded with instructions to reinstate the pro hac vice appearances of plaintiffs' counsel, all in accordance with the Opinion for the Court filed herein this date.

DATE	FILINGS—PROCEEDINGS
06-28-84	Appellee's (Richardson-Merrell) petition for rehearing and suggestion for rehearing en banc
07-16-84	Per curiam order, sua sponte, that the Opinion of the Court filed on May 29, 1984, is amended as follows: (SEE ORDER for amendment); Wald and Mikva, CJs and USDC Judge Richey
07-17-84	Per curiam order, en banc, that the suggestion for rehearing en banc of appellees is denied; CJ Robinson, Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, CJs and USDC Judge Richey (Circuit Judge Wilkey did not participate in this Order)
07-17-84	Per curiam order that the petition for rehearing of appellees is denied; Wald and Mikva, CJs and USDC Judge Richey
07-24-84	Appellee's motion to stay issuance of the mandate pending decision on petition to the Supreme Court
07-30-84	Certified copy of order from Clerk, Supreme Court that petition for writ of certiorari was filed 07-24-84 in SC No. 84-127
08-02-84	Per curiam order that Defendant-Appellee's motion for stay of issuance of mandate is granted and the Clerk is directed not to issue the mandate herein for a period of 90 days from the date of this order; Wald and Mikva, CJs and USDC Judge Richey
10-17-84	Appellee's motion to extend stay of issuance of the mandate pending final disposition by the Supreme Court

DATE	FILINGS—PROCEEDINGS
10-19-84	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari on 10-15-84 in SC No. 84-127
10-24-84	Clerk's order that the Clerk is directed to stay the issuance of the mandate to a day seven days after a final disposition by the Supreme Court

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Relevant Docket Entries in the District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. A. No. 80-1258

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, and JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually,

Plaintiffs,

v.

RICHARDSON-MERRELL, INC., a Delaware Corporation,

Defendant.

DATE	NR	PROCEEDINGS
1980		
May 19	1	COMPLAINT; appearance; jury demand.
1981		
Jan 26	13	APPEARANCE of James G. Butler as counsel for pltfs.

DATE	NR	PROCEEDINGS
1982		
Oct 19	438	APPEARANCE filed October 13, 1982 of Nicholas Allis, as counsel for pltfs.
Oct 20	444	ORDER filed 10-19-82 granting motion of deft to exclude testimony and evidence relating to thalidomide and Mer/29. * * * *
Dec 15	504	SUBMISSION OF PROPOSED TRIAL EXHIBITS of pltfs [sic].
Dec 15	505	LIST of deft of witnesses; exhibits A,B,C, and attachment 1.
Dec 15	506	STATEMENT of deft of qualifications and experience of expert witnesses; exhibit A.
Dec 15	507	STATEMENT of deft of facts to be proven.
Dec 15	508	FURTHER SUPPLEMENTAL of deft to their preliminary list of expert witnesses; exhibit 1.
Dec 15	509	EXHIBIT LIST of deft; exhibits A thru J.
Dec 15	510	QUESTIONS of deft for voir dire examination.
Dec 15	511	INITIAL PROPOSED JURY INSTRUCTIONS of deft.
Dec 15	512	DESIGNATIONS of deft of deposition transcripts for use at trial.
Dec 15	513	STATEMENT of deft of legal contentions; appendix.
Dec 15	514	PROPOSED VOIR DIRE QUESTIONS of pltfs to prospective jurors.
Dec 15	515	SUBMISSION of pltfs of proposed jury instructions; appendix 2.
Dec 15	516	SUBMISSION of pltf of deposition and trial testimony to be read into evidence; exhibit A.

DATE	NR	PROCEEDINGS
Dec 15	517	SUBMISSION of pltf of expert and fact witnesses; exhibit A and B.
Dec 23	538	MOTION by Pltffs. seeking modification of Court's pre-trial order; P&A's.
Dec 27	540	AFFIDAVIT of James G. Butler in support of Motion seeking modification of Court's Pre-trial Order.
Dec 27	544	ORDER filed Dec. 23, 1983, setting case for pretrial conference on 1-11-83 at 10:00 A.M. and directing parties to file a pretrial statement by noon on 1-10-83. • • • •
Dec 29	546	MOTION by deft. for permission to take additional and expedited discovery [re: Janowski] • • • •; Affidavit of Ogden N. Lewis; Exhibits A through I; Memo; Table of Authorities.
1983		
Jan 3	561	TRIAL BRIEF by deft. • • • •
Jan 4	563	ORDER filed 12-30-82 denying pltffs' motion for modification of the Court's Pretrial Order. • • • •
Jan 4	565	ORDER filed Jan. 3, 1983 that deft. may forthwith take the depositions of Krystyna Janowski and the father of her child. • • • •
Jan 5	567	TRIAL MEMORANDUM by Pltffs; Table of Contents; Table of Authorities; Exhibits A through F.
Jan 7	569	MOTION by Pltffs. for expedited hearing on motion to disqualify counsel for witness because of conflict of interest; P&A's.

DATE	NR	PROCEEDINGS
Jan 11	574	ORDER filed Jan. 6, 1983 that the deposition of Krystyna Janowski shall commence on 1-12-83. • • • •
Jan 12	583	ORDER filed Jan. 11, 1983, denying the motion of pltffs. to disqualify Carl J. Schuck, Esq. • • • •
Jan 14	588	ORDER filed Jan. 12, 1983, that Arthur N. Cohen or George Kokus appear before this Court on 1-17-83 and bring certain files; and that said documents be preserved for presentation at this hearing. • • • •
Jan 18	603	MEMORANDUM OPINION filed 1-17-83. • • • •
Jan 18	604	ORDER filed 1-17-83 granting motion of defts to exclude any evidence of the birth defects of Marco Cordova and Pauline Sand. • • • •
Jan 18		HEARING on motions. Deposition of Krystyna Janowski is to be resumed on 1-25-83. • • • • Discovery reopened for limited purpose of taking depositions of George Barnes, Nancy Barnes, Lawrence Larson, Mr. & Mrs. Koller, Pltfs. investigator Humphreys. Special Master is to conduct the additional depositions. Pretrial hearing continued until 1-31-83 at 10:30. • • • •
Jan 21	620	ORDER filed Jan. 19, 1983, affirming ruling of the Special Master [scope of waiver of attorney-client privilege]; and that this ruling shall apply to all other depositions and testimony taken to explore whether a fraud has been committed upon the Court. • • • •
Jan 26	634	ORDER filed Jan. 25, 1983, denying motion of deft. for summary judgment on the issue of causation. • • • •

DATE	NR	PROCEEDINGS
Jan 31		STATUS HEARING • • • • Deft. granted permission to depose two doctors and Mr. Mr. [sic] Clemente, but not Mr. Allis. • • • •
Feb 2	654	MEMORANDUM OPINION filed as of 1-31-83. • • • •
Feb 2	655	ORDER filed as of 1-31-83 denying motion of deft to exclude DERs setting limitations on use of DERs & that pltfs shall notify deft which five DERs they will use 5 days before trial. • • • •
Feb 3	657	STIPULATION filed 2-2-83 re: marking and use of trial exhibits. • • • •
Feb 7	665	MOTION by deft. to strike pltffs' exhibits which have not been served on or made available to deft. • • • •
Feb 7	669	MOTION by deft. for an order imposing sanctions on pltfs' counsel; Memo in support of motion for imposition of sanctions on pltffs' counsel, and to give notice of deft's. intention to move to strike jury demand and to dismiss complaint; Table of Authorities; Affidavit of Ogden N. Lewis w/Exhibit A (in clear binder containing 1 through 14 exhibits); Exhibit B.
Feb 9		• • • • Deft's. motion re Fraud on the Court argued and taken under advisement. • • • •
Feb 10		HEARING on contentions of both parties and pre-trial Matter continued to 2-11-83 at 10:00 A.M. • • • •
Feb 10	679	MOTION by Pltffs. to reconsider and modify th Court's Order of January 31, 1983, on the use of drug experience reports at trial and for leave of Court to supplement memoranda of points and

DATE	NR	PROCEEDINGS
		authorities previously filed with the Court on the issue of drug experience reports; Memo of P&A's; Exhibit 1.
Feb 14	680	RESPONSE of Pltffs. to deft's. Amended memorandum in support of motion for imposition of sanctions on pltffs' counsel and to give notice of deft's. intentions to move to strike jury demand and to dismiss complaint; P&A's; Exhibits A, B, C & D.
Feb 15		PRETRIAL resumed • • • • Respited until 2-16-83 at 10:15 A.M. • • • •
Feb 16		PRETRIAL Resumed and concluded; motions hearing set for 2-17-83 at 10:15 A.M. • • • •
Feb 17		PRETRIAL RESUMES; Motion of deft. to strike jury demand and to dismiss without prejudice heard, argued and taken under advisement; respited to 2-18-83 at 10:15 A.M. • • • •
Feb 18		PRETRIAL resumes • • • • Respited until 2-22-83 at 10:00 A.M. • • • •
Feb 18	705	ORDER granting deft's. motion for summary judgment on the issues of fraudulent misrepresentation and punitive damages. • • • •
Feb 22		PRETRIAL PROCEEDINGS. • • • •
Feb 23		PRETRIAL PROCEEDINGS. • • • •
Feb 25	713	ORDER filed 2-24-83 denying motion of pltffs. to reconsider the Court's order of 1-31-83 regarding Drug Experience Reports. • • • •
Feb 25		PRETRIAL PROCEEDINGS. • • • • Mr. Ryan's deposition is to be concluded and submitted with Mr. Allis' deposition by 2-28-83. • • • • Respited until 3-1-83 at 10:00 A.M. • • • •

DATE	NR	PROCEEDINGS
Mar 2		DEPOSITION of Nicholas R. Allis taken on Feb. 14, 1983 on behalf of deft. w/Exhibits; Errata.
Mar 2		DEPOSITION of Nicholas R. Allis taken on Feb. 24, 1983 on behalf of deft. (Vol. II); Errata; Exhibits.
Mar 2		PRETRIAL PROCEEDINGS. Motion of deft. for evidentiary hearing re: Fraud on the Court heard and taken under advisement. • • • • Respited until 3-7-83 at 10:00 A.M. • • • •
Mar 7		PRETRIAL PROCEEDINGS. • • • • Evidentiary hearing re: Fraud on the Court set for 3/10/83 @ 10:00 A.M. • • • •
Mar 8		DEPOSITION of Patrick M. Ryan taken on 2-26-83 on behalf of pltffs. Exhibits; Errata.
Mar 8	745	ORDER filed 3-8-83 setting an evidentiary hearing on 3-10-83 at 10:00 A.M. on the issue of Fraud on the Court; and that said hearing shall be held to determine whether any further action by this Court is necessary in the interest of the infant Pltf. or other parties to this action. • • • •
Mar 10		EVIDENTIARY HEARING begun and respited until 3-11-83 at 10:30 A.M. • • • •
Mar 11		EVIDENTIARY HEARING resumes; Respited until 3-14-83 at 10:00 A.M. • • • •
Mar 14		EVIDENTIARY HEARING resumes; Respited until 3-15-83 at 10:30 A.M. • • • •
Mar 15		EVIDENTIARY HEARING resumes; Respited until 3-16-83 at 10:00 A.M. • • • •

DATE	NR	PROCEEDINGS
Mar 15 [sic]		EVIDENTIARY HEARING resumes; taken under advisement; Proposed findings to be submitted by 3-22-83 at 12:00 Noon. • • • •
May 2	759	ORDER filed Apr. 29, 1983, to show cause why counsel for pltffs. (Butler, Jefferson, Dan and Allis) should not be disqualified from further representation of pltffs. in this case set for May 31, 1983 at 10:00 A.M. • • • •
May 27	764	MEMORANDUM by Pltffs. regarding Court's Order to show cause why James G. Butler should not be disqualified as counsel for releasing the drug experience reports to the Washington Post and the Food and Drug Admin.; Table of Authorities; Affidavit of James Butler; Exhibits 1, 1A and 2. • • • •
May 31		ORDER TO SHOW CAUSE continued to June 2, 1983 at 10:00 A.M. • • • •
Jun 8	768	SUPPLEMENTAL MEMORANDUM by deft. • • • • Supplemental Affidavit of Ogden Lewis w/Exhibits A through F.
Jun 21		STATUS CALL; order to show cause will resume on 6/30/83 at 10:30. • • • •
Jun 30		ORDER to show cause resumes; Respited until 7-1-83 at 10:00 A.M. • • • •
Jul 1		ORDER to show cause resumes, heard and taken under advisement. • • • •
Aug 24	778	SUPPLEMENT by Pltf. to testimony of Nicholas A. Allis and James G. Butler; Attachment.

DATE	NR	PROCEEDINGS
1984		
Jan 6		STATUS CALL: Further status call set for 1-12-84 at 3:00 P.M. Pltf to update response to defts' motion to dismiss by 1-10-84. • • • •
Jan 6	795	MEMORANDUM OPINION. • • • •
Jan 6	796	ORDER granting in part, deft's. motion to impose sanctions and revoking pro hac vice appearances of James G. Butler and Nicholas R. Allis as counsel for pltf. and revoking appearance of the firm of Butler, Jefferson, Dan and Allis. • • • •
Jan 19	805	NOTICE OF APPEAL by Pltf. from order entered Jan. 6, 1984. • • • •
Feb 1	818	COPY OF ORDER from USCA dated Jan. 27, 1984, granting appellants' motion, staying further proceedings in the District Court pending further order of USCA; granting appellants' request for expedited appeal.

Order of the District Court Excluding Testimony Regarding Thalidomide and MER/29 Filed October 19, 1982

FILED—Oct 19 1982—James F. Davey, Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Division

Civil Action No. 80-1258

(Judge Johnson)

ANNE ELISABETH KOLLER, et al.

Plaintiffs,

v.

RICHARDSON-MERRELL INC.,

Defendant.

ORDER

Upon the motion of defendant Richardson-Merrell Inc. and the affidavits, exhibits, and memorandum submitted therewith, it is hereby

ORDERED that defendant's motion pursuant to Rules 402, 403 and 404 of the Federal Rules of Evidence to exclude testimony and evidence relating to the drugs Thalidomide and MER/29, and any connection of defendant therewith, is GRANTED.

/s/ NORMA HOLLOWAY JOHNSON
United States District Judge

October 19, 1982

Clerk's Office Notification of Trial Date
Dated December 7, 1982

CLERK'S OFFICE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
WASHINGTON, D.C. 20001

December 7, 1982

Mr. George A. Kokus
Mr. Allen T. Eaton
Mr. Richard L. Swick
Mr. W. David Allen
#503;
1025 Vermont Avenue, N.W.,
Washington, D.C. 20005

ANNE ELISABETH KOLLER, et al.

vs.

RICHARDSON-MERRELL, INC.

Civil No. 80-1258

Please be advised that the above entitled case is set for Trial (Continued from 1-10-83) on January 17, 1983, at 10:00 before Judge Norma Holloway Johnson in Courtroom No. 4.

JAMES F. DAVEY, Clerk

By: L.B. Angel
Courtroom Clerk, (535-3547)

cc: Mr. James G. Butler
Miss Anne L. Karppinen
Mr. Michael A. K. Dan
Mr. Donald W. Madole
Mr. Thomas H. Tate
Mr. Mark L. Austrian
Mr. Ogden N. Lewis
Mr. Arthur F. Golden
Mr. Lawrence E. Walsh
Mr. Alfred E. Schretter
File
Chambers
lba

CO 301
Rev. 11/75

Excerpts from Defendant's Proposed Questions for Voir Dire Examination Filed December 15, 1982

United States District Court
for the District of Columbia

(Caption Omitted in Printing)

• • • •

16. Has he read any article with respect to the following:

Birth defects
Drug injuries
Drugs
Drug Companies
Physicians

(a) If so, try to list or describe such articles.

• • • •

35. Has he studied or read as to the causes of birth defects?

• • • •

41. Has he read on this subject?

• • • •

63. It is possible that there will be newspaper stories and TV or radio coverage of this trial. Can the prospective juror disregard these stories and render his verdict solely on the evidence produced in court at this trial?

64. Would he be willing to follow the instructions of this court as to disregarding the newspaper stories and TV coverage?

• • • •

66. Has the prospective juror read any newspaper, magazine or other published story regarding this case, Mrs. Cynthia Koller, Mr. John Koller, Anne Koller, Richardson-Merrell Inc., or the drug Bendectin, including any article published in the Washington Post, Washington Times, U.S.A. Today, the National Enquirer, Mother Jones Magazine or any other publication?

66A. Has the prospective juror read any newspaper, magazine or other published story about Bendectin including any article published in the Washington Post, Washington Times, U.S.A. Today, the National Enquirer or Mother Jones Magazine or any other publication?

66B. Does he recall receiving information from any source regarding Bendectin?

(a) Does any prospective juror read the National Enquirer or Mother Jones Magazine?

67. Has he heard any television broadcast or radio broadcast with respect to Mrs. Cynthia Koller, Mr. John Koller, Anne Koller, Richardson-Merrell Inc. or the drug Bendectin?

• • • •

75. Has the prospective juror read or heard anything about this case prior to today? If so, can the prospective juror disregard what he has heard and be guided in reaching a verdict only by what is presented in court?

• • • •

Affidavit of Ogden N. Lewis in Support of Defendant's Motion for Permission to Take Additional Expedited Discovery Filed December 29, 1982

United States District Court for the District of Columbia

(Caption Omitted in Printing)

AFFIDAVIT OF OGDEN N. LEWIS IN SUPPORT OF DEFENDANT'S MOTION FOR PERMISSION TO TAKE ADDITIONAL EXPEDITED DISCOVERY

• • • •

Ogden N. Lewis, being duly sworn, deposes and says:

1.

• • • • I make this affidavit in support of defendant's motion for permission to take additional expedited discovery in this case on the ground that fraud may have been committed upon the Court and defendant in the maintenance and prosecution of this action.

2. Annexed hereto as Exhibit A is a copy of a telephone message received at the offices of Davis Polk & Wardwell in New York City on December 22, 1982. The message was transcribed at the time it was received by Loretta Hutchinson, a Davis Polk receptionist.

3. Annexed hereto as Exhibit B is a copy of a second telephone message received at the offices of Davis Polk & Wardwell in New York City on December 22, 1982. The message was transcribed at the time it was received by Annette Barth, a Davis Polk secretary. • • • •

12. My letter to the Court and plaintiffs' counsel of December 27, 1982 is annexed as Exhibit G. * * * *

/s/ OGDEN N. LEWIS
Ogden N. Lewis

Sworn to before me this
29th day of December, 1982.

/s/ LINDA D. HURLEY
Notary Public
My commission expires Aug. 14, 1984

(Certificate of Service Omitted in Printing)

Exhibit A to Affidavit of Ogden N. Lewis
Filed December 29, 1982

JUDGE WALSH

FOR: MIRIAM CEDARBAUM

KRYSTYNA JANOWSKY (NICK ALLIS' SECRETARY)

* MRS. KOLLER IS LYING WHEN SHE SAYS SHE TOOK BENDECTIN FROM BULK ORDER AT WALTER REED ARMY HOSPITAL. SHE DID NOT TAKE BENDECTIN TILL MUCH LATER. THE CONTAMINATED SHAK - LEE PRODUCT IS WHAT I (~~BELIE~~) BELIEVE DAMAGED HER UNBORN BABY.

- SHE REFUSES TO WORK ON CASE BECAUSE IT IS FRAUDULENT.

K. JANOWSKY'S #: (312) 384 - 0520

RITA

Exhibit B to Affidavit of Ogden N. Lewis
Filed December 29, 1982

For Mrs. Cedarbaum

Krystyna
Jankowski

Secy to
Nicholas C.
Allis -

afraid she will
lose her job
for calling you
& wants it
kept extremely
confidential.

She has refused
to work on the
Koller case be-
cause Cynthia
Koller was a
health food
fanatic who
"gobbled up"
all kinds of
health food

12/22 during the
first trimester
of her pregnancy.
She particularly
~~ate~~ ingested
Stak-Lee
~~products~~ -
wheat germ
which was
found to be
Contaminated.
Everyone in
her firm is
sworn to
secrecy - not
to mention
Stak-Lee

her # in Chi
is
312-384-0520

Exhibit G to Affidavit of Ogden N. Lewis
Filed December 29, 1982

DAVIS POLK & WARDWELL
1575 I Street, N.W.
Washington, D.C. 20005

(Letterhead Abbreviated in Printing)

December 27, 1982

Re: Koller v. Richardson-Merrell, Inc.
Civil Action No. 80-1258

Honorable Norma Holloway Johnson
United States District Judge
United States Courthouse
Third Street and Constitution Avenue, N.W.
Washington, D.C. 20003

Dear Judge Johnson:

On Wednesday, December 22, 1982 our office received two unsolicited telephone calls from a woman who identified herself as secretary to Mr. Nicholas Allis, one of plaintiffs' counsel. These two telephone communications were taken by receptionists at our office in New York City. The message as relayed was that she refused to work on the case because it is "fraudulent".

We inquired of your law clerk whether it would be possible to arrange a conference before the Court closed for Christmas or whether we might have time to at least verify the identity of the caller. As I had indicated to your law clerk we did not then have any information as to her identity or the bona fides of the messages. Since then we have identified the caller as Mr. Allis' secretary.

Having confirmed this, we arranged independent counsel for the person who communicated with us so that he might advise

her with respect to the law of attorney-client communications and any possible duty to the Court.

It is our understanding that this morning, the person who had communicated with us was told by one of plaintiffs' counsel that she was confronted with possible imprisonment if she persisted with a course of disclosure. We have referred this information to her counsel.

We are sending copies of this letter to counsel for plaintiffs and to counsel for the witness as well as to your Honor so that all may be advised as to the course of these activities.

We respectfully request a conference with the Court so that it may, if it sees fit, prevent intrusion by any party or its counsel until the informant and her counsel have had an opportunity to evaluate the substance of her information and, if appropriate, inform the Court.

Respectfully,

/s/ OGDEN N. LEWIS
O. N. Lewis

Enclosures

cc: James G. Butler, Esq.
Allen T. Eaton, Esq.
Cohen & Kokus
Branton & Branton

Exhibit 21 to Defendant's Memorandum of Law With Respect to Issues of Attorney-Client Privilege—Letter of James G. Butler to the District Court

BUTLER, JEFFERSON, DAN & ALLIS
Attorneys and Counselors at Law
626 Wilshire Boulevard, Suite 914
Los Angeles, California 90017

(Letterhead Abbreviated in Printing)

December 28, 1982

Honorable Norma Holloway Johnson
United States District Judge
United States Courthouse
Third Street and Constitution Avenue, N.W.
Washington, D.C. 20003

Re: Koller v. Richardson-Merrell

Dear Judge Johnson:

On December 28, 1982, we received the letter dated December 27, 1982, directed to yourself from Odgen Lewis with respect to our secretary, Krystyna Janowski.

I was first informed of the nature of the problem on Sunday night, December 26, 1982, when Mr. Richard Daum, a paralegal in our office, called me at home and stated that he had received a call from Ms. Janowski regarding the Koller case. According to Mr. Daum, Ms. Janowski wanted to alert us that she had been approached by a representative of the defendants, namely Barnes and Associates, to sign a statement which in effect stated that she had a conversation with Mrs. Koller in which Mrs. Koller denied ever having taken Bendectin during the first trimester. My first reaction was one of disbelief and I did nothing that evening feeling that perhaps Ms. Janowski was under great emotional stress because of her child. However, after arriving in the office on Monday morn-

ing, I was shown a card bearing the name of George Barnes of Barnes and Associates and a card with the name of Carl Schuck, a local attorney from Los Angeles.

Desiring to obtain the truth of the matter and since Ms. Janowski has recently given birth to a premature child several weeks ago who is still hospitalized, we reached her at California Hospital that morning after several attempts. At that time she made an appointment with Mr. Allis, her superior, who talked to her at the hospital regarding the entire matter. Urged by Mr. Allis to tell only the truth and all of the truth, she stated that she never did have any conversation with Mrs. Koller in which Mrs. Koller expressed any statement other than what she has sworn to under oath in depositions and affidavits in connection with the case. Ms. Janowski, however, did say that she had been offered an apartment and relocation expenses if she would sign such a statement. We also have learned that she stated that she has been offered $15,000 to sign such a statement. Ms. Janowski states that when she was approached by the representatives of the defendant, they had copies of her alleged criminal record (of which we had no knowledge), copies of four bank statements, a plan of our office, the birth certificate of her child, made numerous inquiries of our storage facilities and whether they were fire resistant, and whether we kept duplicates.

Based on the conversation of Mr. Allis with Ms. Janowski on Monday morning, a simple statement of what she had told Mr. Allis was prepared and given to her and signed by her, a copy of which is attached. Also attached is a statement given to Mr. Allis at that time which purports to be the content of the statement (as recalled by her) which she had been urged to sign by the defendant's representatives.

Obviously this is a serious matter and it is my desire that the court have a hearing at the earliest possible date convenient to the court to decide what would be the proper course to follow. It is also requested that defendants be ordered to cease and desist their attempts to contact this secretary.

I must state categorically that at no time has anyone in this office ever threatened Ms. Janowski with possible imprison-

ment if she persisted with the course of disclosure or any other form of intimidation. With respect to the conversations alleged to have taken place with respect to Mrs. Koller, I have consulted with Mrs. Koller and to the extent of any purported conversation of Ms. Janowski with Mrs. Koller, we are willing to waive the attorney-client privilege as to any inquiry by the court or any independent counsel appointed by the court. Parenthetically, Mrs. Koller has again stated categorically that she took Bendectin during the sensitive period.

We view with extreme seriousness the manner in which defendant has sought to handle this matter by sending representatives repeatedly attempting to have our secretary sign a statement. It also concerns me that a call was made to the court without any notification to our firm regarding the nature of the call. We also spoke to Jeff Leon at 3:00 p.m. Washington, D.C. time today in an attempt to immediately set a hearing to advise your honor of the complete circumstances as to what has occurred and the facts as we understand them.

We are very anxious to have this matter resolved quickly and we of course only wish the disclosure of the full truth. I earnestly request that this matter does not delay the trial in any way.

Very truly yours,

BUTLER, JEFFERSON, DAN & ALLIS

/s/ JAMES G. BUTLER
James G. Butler

JGB:fl
cc: Ogden Lewis
Allen T. Eaton
George Kokus
Wiley Branton

Attachment to Mr. Butler's December 28, 1982 Letter to the District Court

27 December 1982

Last week I was in the state of severe agitation and depression and felt a lot of hostility towards the law firm of Butler, Jefferson Dan & Allis. Today I feel calm and my mind is free and clear. At no time did I ever hear Cynthia Koller or anyone else say that Cynthia Koller did not take Bendectin. George L. Barnes & Associates, Inc. had been trying to get me to sign a statment saying that I heard Cynthia Koller say that she did not take Bendectin. Such a statement would be false and I would not sign such a statement for that reason. Mr. Barnes and others have promised that if I signed such a statement they would be able to relocate me and would take care of all of my wants and needs including renting a comfortable apartment for me and by baby. Any conversation I had with George

26

Barnes, Patrick Ryan or any other person from Davis, Polk & Wardwell or George Barnes & Associates was at a time when I was ~~feeling~~ extremely upset and under great emotional stress. At the present time my mind is free and clear and everything in this statement is true and correct. I have been promised no remuneration of any kind by any representative of Butler, Jefferson, Dan & Allis for stating these true statements or for anything else.

KRYSTYNA JASIOWSKI

27

Under penalty of perjury, I swear that the above-typed statement is true and correct.

(KJ)

Second Attachment to Mr. Butler's December 28, 1982 Letter to the District Court

ARE YOU OK?

...I'M JUST WORRIED —

YOU'RE WORRIED ABOUT ALL THESE TREES?

NO. I'M WORRIED ABOUT THE TRIAL.

ARE YOU AFRAID IT'LL BE CALLED OFF AGAIN?

NO. I'M WORRIED ABOUT THE EXPERTS. MAYBE THEY WON'T BE ABLE TO CONVINCE THE JURY THAT BENDECTIN IS A TERATOGEN.

I DON'T THINK THAT THAT'S THE PROBLEM, OUR PROBLEM IS GOING TO BE CONVINCING THE JURY THAT YOU TOOK BENDECTIN DURING THE FIRST TRIMESTER WHEN WE KNOW — AND YOU KNOW — THAT YOU DIDN'T.

JIM BUTLER SAYS HE CAN CONVINCE THE JURY ITS MIDNIGHT, EVEN IF THEY CAN SEE THE SUN SHINING THROUGH THE COURTROOM WINDOWS.

THE ABOVE "CONVERSATION" IS THE ONE THEY WANT ME TO "RECALL" HAVING.

KRYSTYNA JANOWSKI

Exhibit 22 to Defendant's Memorandum of Law With Respect to Issues of Attorney-Client Privilege—Letter of Carl J. Schuck to the District Court

OVERTON, LYMAN & PRINCE
550 South Flower Street, Fifth Floor
Los Angeles, California 90071

(Letterhead Abbreviated in Printing)

January 3, 1983

Honorable Norma Holloway Johnson
United States District Judge
United States Courthouse
Third Street and Constitution Avenue, N.W.
Washington, D.C. 20003

Re: Koller v. Richardson-Merrell

Dear Judge Johnson:

I write on behalf of Krystyna Janowski whom I represent independently of the parties. Ms. Janowski knows my fees and expenses will be paid by the defendants. I have reviewed the facts and circumstances in depth with Ms. Janowski in the course of extensive interviews, and she wishes me to be her lawyer.

Ms. Janowski has reviewed the letter directed to you dated December 27, 1982 from O. N. Lewis of Davis Polk & Wardwell; the letter to you dated December 28, 1982 by James G. Butler of Butler, Jefferson, Dan & Allis; and the discovery motion papers, dated December 29, 1982, signed by defense counsel and presumably filed with this Court. Ms. Janowski and I have also read the exhibits attached to all the foregoing materials.

Ms. Janowski, by this communication, disavows the one-page typewritten statement signed by her and dated in writing at the right upper corner "27 December 1982." That statement was obtained from her under duress and on an offer to

continue payment by the Butler firm of her full salary and fringe benefits, including hospitalization expense coverage, for her hospitalized premature baby. Ms. Janowski has repeatedly told partners and representatives of the Butler firm that she was no longer working for them, and all she wanted was the pay due her, including accumulated vacation pay, and the right to maintain her medical insurance. She reaffirms that position and specifically does not want that firm to send her any checks or money for anything other than what she is entitled to.

I have advised Ms. Janowski to submit to testifying fully and truthfully to the facts and circumstances surrounding the signing of the typewritten statement just referred to, and the other matters subject to privilege constraints. I have also advised her I would request the deposition take place in Los Angeles because she has a premature baby born November 27, who now weighs less than 4 1/2 lbs. Also, I have advised that because of the sensitivities involving privilege and otherwise and to protect her against potential harassment at deposition, I would as her counsel take the position that the deposition only be taken before a special master appointed pursuant to Rule 53 F.R.Civ.P. and that, among other things, there be an appropriate order that the master conduct the proceedings and make rulings on objections, including any relating to privilege.

Your clerk can reach me at (213) 683-5333. My residence number is (213) 617-7117.

Very truly yours,

/s/ CARL J. SCHUCK
Carl J. Schuck

CJS/pl

cc: All Counsel

I have spent many hours with Mr. Schuck reviewing the matters above referenced. He has given me the advice above described and, after consideration, I accept it. I disavow the statement referred to and am willing to submit to deposition in the manner he has described above.

/s/ KRYSTYNA JANOWSKI
Krystyna Janowski

Excerpt from United States District Court for the District of Columbia Hearing Transcript of January 4, 1983

[12] * * * * MR. WALSH: He again reiterated his feeling for a need of a special master because of the privilege questions, and he asked that the deposition be taken either in federal court or his office and that papers hereafter be served on [13] him rather than Ms. Janowski.

May I interrupt all of this to tell you how he came into the case and his relationship with us?

When we finally located Ms. Janowski, it occurred to us that the attorney/client privilege could be a potential embarrassment and that we might blunder into it in trying to find out what she had to say. I called Leonard Jenofsky, who is a former president of the American Bar Association in Los Angeles, and asked him whether he would act for Ms. Janowski completely independent of us. He considered it with his firm and decided they should not because of Mr. Jenofsky's acquaintance with me. They recommended Mr. Schuck, whom I don't know. As far as I know, I have never met him. They made the arrangement with Mr. Schuck. All I did was ratify it and commit the defendant to pay whatever there is to pay as far as his fees are concerned. But he has made perfectly clear to me that he is not concerned with this lawsuit; he's concerned with his client, who is the witness, and his independence is paramount in his mind. He is as opposed to our intruding on her privacy as he is Mr. Butler, and one of his requests is that no party deal with her until she is deposed at a time to be set by Your Honor. * * * *

Plaintiffs' Motion to Disqualify Counsel for Witness Because of Conflict of Interest Filed January 7, 1983

United States District Court
for the District of Columbia

(Caption Omitted in Printing)

MOTION TO DISQUALIFY COUNSEL FOR WITNESS BECAUSE OF CONFLICT OF INTEREST (DECLARATIONS OF NICHOLAS ALLIS, J. BUTLER, WILLIAM CANALEZ, RICHARD M. COLEMAN, RICHARD DAUM, AND FLOYD HUMPHRIES ATTACHED HERETO)

Based upon the aforesaid Declarations, this Motion and the memorandum of law submitted herewith, plaintiff ANNE ELISABETH KOLLER, hereby moves this Court for an Order disqualifying Carl Schuck from acting as attorney for the witness Krystyna Janowsky and for an Order by this Court appointing independent counsel for Ms. Janowsky—the fees and expenses for said counsel to be shared equally by the plaintiff and defendant in the instant action and said independent counsel to be someone not connected with a firm heavily engaged in either insurance defense or plaintiff personal injury practice. The facts contained in the attached Declarations reveal that Mr. Schuck has been hired and paid for by the defense firm, is with a firm that does extensive representation of insurance defendants, owes "favors" to the defense firm and has made certain statements, all of which indicate that he has interests which may be in conflict with the interests of Ms. Janowsky, who was formerly employed by the law firm representing the plaintiff in her suit against the defendants. The Declarations also reveal that Ms. Janowsky stated that her initial contact with the defense firm was solicited by an unidentified man who said the firm had a remunerative offer to make to her.

DATED: January 4, 1983.

BUTLER, JEFFERSON, DAN & ALLIS

By /s/ JAMES BUTLER

Excerpts from Plaintiffs' Memorandum of Law in Support of Motion to Disqualify Counsel for Witness Filed January 7, 1983

(Caption Omitted in Printing)

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR AN ORDER DISQUALIFYING COUNSEL FOR THE WITNESS JANOWSKY AND FOR AN ORDER THAT INDEPENDENT COUNSEL BE APPOINTED

* * * *

III. *Requested Relief.*

Plaintiff respectfully requests that the Court, after consultation with the State Bar of California, select counsel for Ms. Janowsky who is not associated with a firm that is heavily engaged in either insurance defense or plaintiff personal injury practice. The fees and expenses of the attorney so selected will be shared equally by plaintiff and defense. * * * *

Excerpts from Declaration of Richard M. Coleman Dated January 3, 1983 Annexed to Plaintiffs' Motion to Disqualify Counsel for Witness

I, RICHARD M. COLEMAN, declare:

1. I am an attorney, a member of the State Bar of California and counsel for the firm of Butler, Jefferson, Dan & Allis (hereinafter "The Butler Firm") in regard to charges raised against the firm by the defense in the case of KOLLER vs. RICHARDSON-MERRELL, INC., Civil Action No. 80-1258 pending in the United States District Court for the District of Columbia.

2. On Friday, December 31, 1982, I received a telephone call from Nicholas Allis of The Butler Firm. He said someone was getting on the other line whom he introduced as William

Canalez, a private investigator. Mr. Canalez stated that he and Mr. Allis had talked with Krystyna Janowsky in the lobby of the law firm's building.

3. Ms. Janowsky stated to them that she was unhappy with the great amount of pressure that was being put on her by the other side to sign a statement. She said they must be spending a fortune because cars were following her all the time.

At this point, Mr. Canalez heard Mr. Allis say to Ms. Janowsky that she had an attorney and he (Mr. Allis) could not talk to her about it.

Ms. Janowsky replied that she did not have an attorney, that Carl Schuck was not her attorney and as far as she was concerned, Mr. Schuck was the attorney for the Davis firm. She said that if she signed a statement, then he would become her attorney but he was not her attorney now.

4. Messrs. Canalez and Allis both stated that Allis at this point told Ms. Janowsky to call Mr. Schuck and have Mr. Schuck get in touch with Mr. Coleman and with the Davis office so that she could get truly independent counsel. At this point, Mr. Canalez said that Ms. Janowsky replied that she did not want a lawyer and that she did not need a lawyer. She said that she spent nine hours in an attorney's office with them trying to get her to sign a statement. Mr. Canalez and Mr. Allis both stated that Mr. Allis asked Ms. Janowsky words to the effect "Is everything you said in the statement you gave to me true?" Mr. Canalez and Mr. Allis heard Ms. Janowsky respond that that statement was all true.

5. On Monday, January 3, 1983 at approximately 7:30 a.m., I received a telephone call from a woman who identified herself as Krystyna Janowsky.

6. She said that she was under terrible pressure by the other side and that she had gone to the hospital to get away from them; that they wanted her to give them a statement and she did not want to give them a statement. She said she had been trying to give a statement that the original charge was dishonest but they said that she could not go back, she had to go

forward. She said they had people following her around the clock. She asked me if I had a copy of the statement she had given to Nick Allis. I said I did. She said she had a husband in Mexico and that is where she wanted to go but then she got worried that perhaps if she did that, the statement she gave to Mr. Allis would not be sufficient to clear things up and she wanted to give a complete statement to that effect.

7. She said that she did not know what to do because she had a lawyer, Carl Schuck, who she thought was a good person but owed favors to the other side and did not want her going back on anything. All he wanted was to have her go forward and give a statement. She said Mr. Schuck wanted her to give a statement even though she told him she did not want to do so. He had told her that a deposition had already been set up. She said that on another occasion, they had tried to make her give a deposition without any notice to her. She had walked into a room and found a court reporter there and she just ran.

8. I said that if she is represented by counsel, I could not speak with her. She said she did not know what to do, how to extricate herself from the position.

9. I said that no one can force a lawyer on anyone and that she could discharge a lawyer anytime she wanted. She said they told her that if she did that she would be without a lawyer and she would be like a sheep among wolves. I told her that she could get a lawyer that was not indebted to either side to protect her interests but I said that I could not speak with her as long as she was represented by counsel and that she as an experienced legal secretary would understand that.

10. She said that she did not know what to do and that she had a nine o'clock appointment that morning with Mr. Schuck. I suggested that she call Mr. Schuck and discuss the representation with him and that, if she liked, she should ask him to call me and, if she wanted me to do so, I would go down to his office and meet with him. She said alright and we terminated the call.

11. When I did not hear from Mr. Schuck by 9:15 a.m., I called him and related the above. I told him I intended to recommend to the Butler Firm that a Motion be made to disqualify him from representation of Ms. Janowsky. He said Ms. Janowsky was in his office and he would call me in a bit. He telephoned at approximately 2:45 p.m. to say Ms. Janowsky was willing to give a deposition and he would arrange a conference call with all interested parties.

* * * *

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California this 3rd day of January, 1983.

/s/ RICHARD M. COLEMAN
Richard M. Coleman

Affidavit of James G. Butler Dated January 5, 1983 Annexed to Plaintiffs' Motion to Disqualify Counsel for Witness

(Caption Omitted in Printing)

AFFIDAVIT OF JAMES G. BUTLER

* * * *

JAMES G. BUTLER, being duly sworn, deposes and says:

1. I am a member of the law firm of Butler, Jefferson, Dan & Allis, attorneys for Plaintiffs. I am a member of the Bar of the State of California and of various federal courts.

2. I make this affidavit in support of the plaintiffs' motion to remove Carl Schuck as independent counsel for Krystyna Janowski.

3. On December 27, 1982, I was informed that Carl Schuck had come to her house and left his card attempting to act as

attorney for Krystyna Janowski. I was informed that Ms. Janowski did not consider him as her attorney and that she felt that he was acting on behalf of the defendant Richardson-Merrell.

4. On December 28, 1982, I received a copy of the Ogden Lewis letter to the court in which Mr. Lewis stated "we arranged independent counsel for the person who communicated with us so that he might advise her with respect to the law of attorney-client communications." Upon receipt of that letter on December 28, 1982, noticing that the copy of the letter we received indicated no copies other than to James Butler, Allen T. Eaton, Cohen & Kokus, and Branton & Branton, I wondered why a copy had not been sent to the alleged "independent attorney." I then called Schuck, whose card had been left with Krystyna Janowski and had been provided to us by her, and had a conversation with him. I first asked him if he had received a copy of the Ogden Lewis letter of December 27 even though it had not been indicated on my copy of that letter and he acknowledged he had received a copy of Mr. Lewis' letter to the court.

5. I next asked him "Are you being paid by Davis, Polk?" and he replied "Can't answer." I asked him if he had a copy of Ms. Janowski's statement. He stated he didn't see Ms. Janowski today, December 28, and he didn't know if he expected to see her, that everything was set for him to see her but Ms. Janowski didn't keep her appointment. I asked him who called him into this and he answered "I was asked to act independently for her by Ed Walsh and that I [Schuck] told him [Walsh] that I [Schuck] would do it only on the explicit understanding that I [Schuck] was being totally independent." Schuck further stated that he didn't find out about the communication to the court until after it had happened. I then advised him that I would send him a copy of Ms. Janowski's statement which I did that same day.

6. The firm of which Mr. Schuck is a member has represented defendants in cases in which our firm represents plaintiffs including the current case of *John Leon Seevers v. Syntex Laboratories, Inc.*, Case No. C231575 presently pending in the Superior Court of the State of California for the County of Los Angeles. In this case, Mr. Schuck's firm has represented a large pharmaceutical company. His firm also has opposed our firm in other cases including the Estate of J. Paul Getty and has also represented American Airlines in the DC-10 crash in Chicago at O'Hare in which we represented plaintiff cases.

7. It is my belief that he cannot act as "independent counsel" not only because he is being paid by the defendant in this case but also because his firm has represented at least one pharmaceutical company in a similar case involving birth defects caused by a drug, e.g., birth control pill. It is my belief that the case presently pending before the court has far reaching effect to the entire pharmaceutical industry and in which I believe there is a basic conflict of interest in representing this woman under these circumstances. It is not my intention to impugn the integrity of Mr. Schuck but I believe under the circumstances, he cannot "act as independent counsel."

/s/ JAMES G. BUTLER
James G. Butler

Sworn to before me this
5th of January 1983.

/s/ CAROL M. ASAKURA
Notary Public

[SEAL]

Affidavit of Richard Daum Dated January 5, 1983 Annexed to Plaintiffs' Motion to Disqualify Counsel for Witness

(Caption Omitted in Printing)

AFFIDAVIT OF RICHARD DAUM

• • • •

I, RICHARD DAUM, being duly sworn, deposes and says:

1. I am a legal assistant in the law firm of Butler, Jefferson, Dan & Allis. On Sunday, December 26, 1982 I received a call from Krystyna Janowski asking to speak with Mr. Nicholas Allis. Mr. Allis was not in and she spoke to me at length.

2. Essentially, she stated that she had been contacted by investigators for Davis, Polk & Wardwell and an attorney associated with Davis, Polk & Wardwell. She said these people were trying to pressure her to sign a statement that was untrue concerning ingestion of Bendectin by Mrs. Koller. She said that investigator George Barnes approached her and had a copy of her criminal record, her bank account, her child's birth certificate and a floor plan of our office. Neither I nor any one that I am aware of knew that she had a criminal record. He offered to pay for a top "defense" attorney for her. It was unclear whether the attorney was going to be for her criminal problems or possible problems associated with these events. In any event, she feared arrest if she did not cooperate and was told an attorney would visit her the next day.

3. On Friday at 8 or 9 o'clock in the morning, a man with grey hair, over 6 ft. tall, 60 to 65 years old and wearing a grey suit arrived at her apartment. He was uncomfortable that Luis Castillo was there and did not want to talk. He identified himself as Carl Schuck of Overton, Lyman & Prince. He stated that he did not want to do what he was doing. He felt that it was unethical but he had a favor to repay. He wanted to just give her some counseling, but wished to do it when she was alone. He read something to Krystyna which she believed to be from some evidence code. They agreed to meet in his office at

10:30 a.m. Tuesday, December 28, 1982. He wrote his name and address and an appointment time on a card. She did not state that this man was her attorney. On the contrary she acted as if he was associated with Mr. Barnes and Mr. Ryan and that Mr. Schuck's role was part of their efforts to have her sign a statement which she believed to be false.

/s/ RICHARD DAUM
Richard Daum

Sworn to Before Me This
5th Day of January, 1983.

/s/ CAROL M. ASAKURA
Notary Public

[SEAL]

Affidavit of William Joseph Canalez Dated January 5, 1983 Annexed to Plaintiffs' Motion to Disqualify Counsel for Witness

(Caption Omitted in Printing)

AFFIDAVIT OF WILLIAM JOSEPH CANALEZ

I, WILLIAM JOSEPH CANALEZ, being duly sworn depose and say:

1. I am a Private Investigator licensed in the State of California and the owner of Cambridge Investigations, 15760 Ventura Boulevard, Suite 900, Encino, California 91436.

2. I have been in the field of investigations for 18 years including 12 years as a Special Agent for the Federal Bureau of Investigations. I am fluent in Spanish and English.

3. On December 31, 1982, I went to the office of Mr. Nicholas Allis at 626 Wilshire Boulevard, Los Angeles, at his request, to discuss the matter concerning his former secretary

in a law suit which his firm is handling. Shortly before 11:00 a.m. Mr. Allis and I began discussing this matter in his office. About thirty to fourty minutes into the conversation, there was a knock on his door. The door was opened and a young man in his twenties of Mexican extraction, walked in with a very young baby in his arm. This person was identified as Luis. For approximately five to ten minutes we talked about the baby, its health etc. and the mother and her health etc. Subsequently, we talked to him regarding his knowledge of the Bendectin lawsuit and the events of the past week. Luis mentioned several occasions on which investigators for Defendants had spoken to Krystyna Janowski. The latest occurred the day before, December 30, 1982, at the hospital. When Krystyna went to pick up her baby, there were about nine persons who, according to Luis, had rented a room in the hospital. They wanted a private place where they could speak to Krystyna alone. Krystyna spoke to them for fifteen to twenty minutes. Luis was not present during any of these conversations. He knows Krystyna was asked to sign a paper on previous occasions or occasion by Defendants but refused.

4. I translated into Spanish what the statement signed by Ms. Janowski stated and Luis said he understood. He advised to the best of his knowledge that the information in this paper was correct. He said he knew that she had signed that statement for Mr. Allis. He stated that he knew Krystyna was unhappy about pay, long hours, and losing her parking space.

5. Subsequently, I went to the lobby of the office building, helping Luis carry items belonging to Krystyna Janowski. We found her in the Savings and Loan on a public telephone. When she saw us she said to Luis "did you sign a statement?", Luis said "no." She asked Luis, "Did you give them a statement?" Luis said "no." She asked Luis why did they have you and my baby locked up? Luis shook his head from side to side and said "Krystyna No . . . " while shrugging his shoulders. I left without saying anything since she appeared very upset and concerned about whether Luis had given a statement. I went

back to the office of Butler, Jefferson, Dan & Allis and Mr. Allis subsequently accompanied me to the lobby. She stated that she had called the police. She claimed that two secretaries in the office had lied to her about Luis' whereabouts when she had called the office. She stated she was going to charge the office with kidnapping. Ms. Janowski demanded her vacation pay. Mr. Allis asked her how much was due her. She advised two weeks. Mr. Allis advised he would go upstairs to check on this matter. He did go upstairs and returned several times, first to secure the amount from the pay check which had already been given Ms. Janowski and the second time to return with the check for the vacation pay. She continued to be upset about Luis. She was advised by me that Luis had been free to go whenever he wanted and that there were persons who had come into the office to see the baby while Luis was there.

6. Initially, Mr. Allis advised Ms. Janowski that he was uncomfortable in talking to her. He asked if she was represented by an attorney. She said that she was not represented by an attorney. She denied that she was represented by Mr. Schuck and said he was not her attorney. Instead, the New York law firm representing Defendants had hired Mr. Schuck and he was their attorney. She stated that she did not need an attorney. Only if she signed a statement for them would Mr. Schuck be her attorney and she had not signed any statement and was not planning to sign any such statement because the statement they wanted her to sign was false.

7. Towards the beginning of the encounter with Ms. Janowski, Mr. Allis told her that he would like to talk to her but it would be more comfortable in the presence of attorneys. Since she said that Mr. Schuck was not her attorney, Mr. Allis advised her to go to Mr. Schuck and demand that he immediately call Mr. Coleman and an attorney for Davis, Polk and Wardwell and arrange for independent counsel to be appointed for her. She stated that she did not need or want an attorney.

8. During this entire period when I was with Krystyna Janowski in the lobby, she was at times speaking very loudly

and was upset. At other times, she was quiet and pleasant. When she was upset, she advised she was going to the police station and file a report that her baby had been kidnapped; she also advised that her memory had just crystallized and that she was just going to see Davis, Polk and Wardwell and give them a statement; she further advised that Davidia Vega and Faye Lum-Lee had lied to her about the whereabouts of Luis and her baby. She said Mr. Allis knew that they had lied and that Mr. Allis was responsible for them lying.

9. When Ms. Janowski was calm, she advised that the statement she had signed for Mr. Allis was true. She said the other side had to be spending lots of money because they had so many different people working on the case and were spending so much time on this case. They were pressuring her to make a statement which she did not want to make because it would be false. She said they had been to see her many times at her residence and they even had someone watching her residence from a car parked on the street. Additionally, on one occasion Luis went to the bathroom to urinate and he saw a white male with a beard who was looking inside through the window. She advised this person had come to her house with the private investigator George Barnes. When she was at the hospital there were about nine persons there. They had obtained a room in the hospital and were there trying to take a statement from her. She talked to this group, some of whom were from New York City, but did not sign any statement. She advised she did not want to talk to them and did not want to be bothered by them. She advised she knew it was a powerful New York law firm and possibly it would be wise to cooperate with them. She also advised she had seen attorney Schuck for many hours. He had shown her documents, papers which had been filed in this case. She said she was familiar with everything they were filing with the Court. She further advised that Schuck was from an influential law firm in Los Angeles. She pondered the possibility that if she signed a statement for him, his firm might be able to find her a good job.

10. Mr. Allis asked her not to leave the area but to stay and tell the truth. Then, she turned to Mr. Allis and said my memory has just "crystallized" and I'm going over to sign a statement at Davis, Polk and Wardwell and then I am going to Mexico with my baby to visit my husband and I have a perfect right to do [illegible].

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 5th day of January, 1983, at Los Angeles, California 90017.

/s/ WILLIAM J. CANALEZ
William Joseph Canalez

Subscribed and sworn to before
me on this 5th Day of January,
1983, at Los Angeles, CA.

/s/ DONNA K. RANTA
Notary Public

[SEAL]

Excerpt from Exhibits Annexed to Plaintiffs' Opposition to Defendant's Motion to Take Depositions of Plaintiffs' Representatives Filed January 10, 1983

United States District Court
for the District of Columbia

(Caption Omitted in Printing)

DECLARATION OF REAR ADMIRAL
G. J. B. CRABB, RET.

I, G. J. B. Crabb, being duly sworn, testify and declare:

1. I am retired from the Australian Navy where I held the rank of Rear Admiral. On August 25, 1980, I wrote a letter to Dr. William McBride concerning what I believe to be an investigation of Dr. McBride in order to discredit him as a witness in a case in Florida involving the marketing of a pill which allegedly resulted in the malformation of a child. The letter which I wrote to Dr. McBride is attached to this affidavit and incorporated herein. It sets forth the facts as I know them of my personal knowledge and I incorporate the recitation of those facts in this affidavit.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 7th January, 1983.

/s/ G. J. B. CRABB
G. J. B. Crabb
Rear Admiral, Ret.

Declared before me at
Sydney the 7th January 1983

/s/ G. L. NEWTON
G. L. Newton
Solicitor
44 Northcote Ave.
Killara 2071
Phone 498-1541

Attachment to Declaration of Rear Admiral G. J. B. Crabb, Ret. Dated January 7, 1983

Wahroonga. 2076

25th August, 1980

Dr. W. G. McBride,
123 Queen Road,
WOOLLAHRA. 2025

Dear Doctor,

I am writing to you because last week I inadvertently became involved in an incident about which I think you should be informed.

On returning from an inter-state trip on Thursday, 21st August, I found a message on my telephone recorder from a person in Los Angeles. This person inferred that he was a member of the American Society of Industrial Security (to which I belong) and asked me to call him. It was too late for me to do that, but on Friday, 22nd he called from his hotel in Sydney and requested a meeting.

I went to his hotel and immediately on meeting I produced my A.S.I.S. card as identity, but all he produced was a normal business card. It turned out that he had a friend who belonged to A.S.I.S. and as I am the only registered member of that Society in Sydney, they proposed to use me as a local contact.

From the conversation which followed, I understood that a law suit had been held recently in the State of Florida, where a husband and wife sued a pharmaceutical company for producing and marketing a pill which resulted in the malformation of their child. The Jury awarded a mere $20,000 to the parents and nothing to their child. The trial judge ruled a mis-trial and preparations are now being made for a new trial. It is important as a test case.

The person to whom I spoke is working with his wife, on behalf of the pharmaceutical company. He said that you have

agreed to give evidence as an expert witness, and that he and his wife had been sent here to check on your background.

He showed me a paper which contained a summary of your career, together with a list of papers which you have published. He said that a complete copy of the latter was held by his principals in New York who were carrying out a close study of them.

He wanted to get access to any police or civilian court proceedings in which you may have been involved, but I said that that was virtually impossible, and gave him a dissertation on the activities of the Privacy Committee.

There was no doubt in my mind that this couple had been given considerable financial backing to find out as much as possible about you with a view to discrediting you in any way possible.

As they return to the U.S.A. on Wednesday, 27th August, I would not be surprised if they employ a private inquiry agent to follow up their own investigations.

I have no desire to participate in such activities as outlined here, neither do I have any reason to be involved in any action which might damage or hurt you.

I have told the people concerned that I do not wish to be involved any further in their activities and I am very annoyed that I was misled into being used as a local contact in the first place.

You will, of course, understand that the case in question could be likened to that which found against the Distillers Company, resulting in a huge loss to that company. I was told that in this case money is no object in achieving their aim of discrediting new witnesses.

I have tried to keep the information in this letter in perspective so as to warn you of possible personal surveillance without exaggerating the situation.

/s/ G. J. B. CRABB

G. J. B. Crabb.

This and the preceding page is the letter referred to in the declaration of G. J. B. Crabb declared before me at Sydney 7th January 1983

/s/ G. L. NEWTON
G. L. Newton
Solicitor
44 Northcote Ave.
Killara 2071
Phone 498-1541

Second Supplemental Declaration of Richard M. Coleman Filed January 10, 1983

United States District Court for the District of Columbia

(Caption Omitted in Printing)

(Judge Johnson)

SECOND SUPPLEMENTAL DECLARATION OF RICHARD M. COLEMAN IN SUPPORT OF MOTION TO DISQUALIFY COUNSEL, ETC.

I, RICHARD M. COLEMAN, declare:

• • • •

In paragraph 7 of my former Declaration, I stated: "She said that she did not know what to do because she had a lawyer, Carl Schuck, who she thought was a good person but owed favors to the other side and did not want her going back on

anything. All he wanted was to have her go forward and give a statement." • • • •

3. In that context of "not going back", Ms. Janowsky also told me that it was not just Mr. Schuck who wanted to go forward but the other side as well. She said she wanted to say it was "dishonest" but they would not let her go back on her statement to them. • • • •

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California this 7th day of January, 1982 [sic].

/s/ RICHARD M. COLEMAN
Richard M. Coleman

(Certificate of Service Omitted)

Order of the District Court Denying Plaintiffs' Motion to Disqualify Counsel for Witness Filed January 11, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1258

ANNE ELISABETH KOLLER, *et al.*,
Plaintiffs,

v.

RICHARDSON-MERRELL, INC.,
Defendant.

ORDER

Upon consideration of plaintiffs' motion to disqualify Carl J. Schuck, Esq., as counsel for Krystyna Janowski and Luis

Castillo at their depositions to be taken pursuant to the Court's order of January 6, 1983, and upon defendant's opposition thereto, the accompanying memoranda of law, the various affidavits and declarations, and the entire record herein, it is this 11th day of January, 1983,

ORDERED that the motion of plaintiffs to disqualify Carl J. Schuck, Esq. be, and hereby is, DENIED.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

Order of the District Court Requiring Arthur N. Cohen or George Kokus to Appear Filed January 12, 1983

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Division

FILED—Jan 12 1983—James F. Davey, Clerk

Civil Action No. 80-1258
(Judge Johnson)

ANNE ELISABETH KOLLER, et al.,

Plaintiffs,

v.

RICHARDSON-MERRELL INC.,

Defendant.

ORDER

Upon the affidavit of Lawrence E. Walsh, sworn to January 12, 1983, it is hereby ORDERED that Arthur N. Cohen, Esq. or George Kokus, Esq. shall appear before this Court on January

17, 1983, and bring with them their files and the files of the firm of Cohen & Kokus relating to the above entitled action, including any communication to or from Cynthia Koller, John Lamont Koller, Roger F. Palmer, Alan Ezrin and James Helm relating to the birth defects of Anne Elisabeth Koller, the alleged use of Bendectin by Mrs. Koller, the pregnancy history of Mrs. Koller, and any other document relating thereto, and any documents relating to Walter Reed Army Medical Center and its Forest Glen Annex ("Walter Reed") and to medical, prescription, bulk order laboratory or other records of the Kollers at Walter Reed.

IT IS FURTHER ORDERED that all said documents be preserved for presentation to the Court at the above designated hearing.

/s/ NORMA HOLLOWAY JOHNSON
United States District Judge

January 12, 1983

Excerpt from United States District Court for the District of Columbia Hearing Transcript of January 12, 1983

[24] THE COURT: • • • •

I have indicated that I will not need the jury on Monday because I had a jury planned for Monday, and I have told Mrs. Angel not to bring the jury panel in. But if we **[25]** can possibly get to pretrial, that is what I would choose to do Monday and Tuesday. • • • •

Excerpts from Deposition of Krystyna Janowski Held on January 12, 1983

KRYSTYNA JANOWSKI, called as a witness by the Defendant, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. Struve

[23] • • • • Q. Could you in talking about that product in your discussion with Mrs. Koller give us your best recollection of what was said both by you and Mrs. Koller. A. Well, she looked pale and I thought that maybe the trip was harsh on her and I felt bad that she was under all this pressure because this law suit has been an ongoing thing for a number of years with her and I asked her if she was all right.

I thought maybe there was something else I could do for her, an aspirin or whatever, and she responded that she was all right. She was just worried.

Well, that was understandable because she was about to be thoroughly interviewed by a **[24]** genetic specialist and she knows how crucial a negative genetic report is to her law suit and so she responded well, she was worried and I asked her whether she was worried about the exam or the trial, to try to put her at ease and she said that she was worried, she did not respond what I thought—I thought she would say that she was worried about the hospitalization confrontation. She said that she was worried about the experts. And I was surprised to hear that because that seemed like an out-of-place thing for her to be worrying about at that particular time. The trial was far in the future and could be continued at any time.

And I asked her why was she worried about the experts. How did that have anything to do with it and she said that she was worried whether or not the experts could convince the jury and judge that Bendectin was an agent that had damaged her child. I didn't think that was a problem and I told her so. I thought the problem was to convince the jury and the judge that she had taken Bendectin at the time she was saying she originally had when she knew and we knew that she hadn't.

And she didn't think that was a problem. She said that she didn't think that was a problem because Jim Butler could convince the jury that it was midnight even though the sun was shining **[25]** through the courtroom windows which was really kind of a reputation Jim Butler has. We thought it was both a funny remark and she laughed and I laughed and that lightened the mood a little bit. She looked a little more at ease, a little more comfortable and we had talked many, many times on the telephone so that we were on a first-name basis and I reassured her if there is anything else I can do for you, just let us know. It was not a lengthy conversation but it was a friendly one.

Q. Now when you said in substance that you knew and she knew that she had not taken Bendectin when she said she did, what response, if any, did she make to that? A. Well, I was a little bit angry because this case was putting a lot of pressure on us and I felt that this case had been unloaded on us by a previous law firm and I said to her that we have a problem with this, with convincing the judge and the jury about that. And she didn't respond. She didn't acknowledge my statement by saying well, that is a problem because I didn't take the Bendectin nor did she refute my accusation by saying well, that's a lie, I did take the Bendectin. She tacitly acknowledged what I was saying was right but it is no problem because Jim Butler is going to take care of that. Jim Butler **[26]** is a hell of a lawyer and no one here will disagree with that.

Q. Was there any further discussion between you and Mrs. Koller in the conference room? A. There certainly must have been but it was nothing of great import. We discussed the fact that she was a Christian woman and it gave her strength to deal with some of this and little things like that, nothing of great substance.

Q. Was there any further discussion of the question whether or not she had taken Bendectin at the time she said she did? A. No, it just came up in that one instance spontaneously for a few seconds. It was never touched on again. • • • •

[42] * * * * Q. Now, Mrs. Janowski, coming back to the discussion that you had described, you said that Mrs. Koller said something like—and this is my recollection—"If the experts say that it has **[43]** to have been taken on day 1, then I am going to say that it was taken on day 1."

Did Mrs. Koller say anything else in that telephone conversation any more specifically about when she did take it? A. The only other thing she said she—after she expressed her concern about the constant request for medical authorization releases, for the endless discovery of medical records, she asked me if the questionnaire was going to be examined or questioned. Her voice sounded concerned. I am speculating. I thought she was concerned.

She asked me if they were going to investigate the questionnaire.

I didn't know what questionnaire she was talking about. I asked her which questionnaire.

She said, "The questionnaire they filled out when I first contacted the Florida lawyers."

I knew she meant Cohen & Kokus. This was the first I had ever heard about the questionnaire.

I told her—Nick is always yelling at me not to give legal advice and not to talk like an attorney, but I always forget, and I just answered spontaneously I couldn't imagine that there would be anything for her to worry about. It's just a questionnaire.

[44] She says—Well, she says, "I am worried about the questionnaire because when I first contacted Cohen & Kokus"—she said the Florida law firm, "they gave me, they gave me or sent me a long questionnaire, five or ten pages, and after I filled it out and when they read it, they told me that my answer to the most important question on the questionnaire, 'When did you first take Bendectin,' was wrong, and that I didn't have a lawsuit with that question answered the way it was."

I didn't know what questionnaire she was talking about.

I considered myself relatively familiar with all the records of the Koller case, because I worked on it every day of the week, many hours a day.

I don't recall if I made any comment or injected any words, but she went on to say that—I don't recall the exact words she used, but she said that they had discussed it with her, and she realized that she would have no lawsuit the way it stood.

They helped her to fill out a new questionnaire and then proceeded with the preparation to file suit.

Right at this point I think my mouth kind of dropped open, because what she was saying indirectly was that it was—the facts had been **[45]** rearranged at the very beginning to lay the foundation for a lawsuit.

I felt that what she was saying was that the date at which she had first taken Bendectin had been moved back by the Cohen & Kokus firm in order to place her within that critical period.

Now, as far as Cindy Koller is concerned, she took the Bendectin, and she doesn't care what happens. She's got this determined absolutely. I could hear where she was coming from.

If they said it's got to be taken on day 1, she trusts her lawyer. I trust my lawyer.

If her lawyer tells her, "This is filled out wrong, you have to move the date back." I can understand that, and I accepted that, and later, I went and I searched through all the Koller records to find this questionnaire, and indeed I found it, and it was as she said, a long questionnaire, five or ten pages, and I started reading through it and I came to the question, the obvious question, "When did you first take Bendectin," or something to that effect, and she had written either "Right from the beginning," or "Right from the start," or "Since day 1," I don't recall, but what she had told me, that this was not the original questionnaire, this was a second questionnaire that she had redone at their **[46]** request to put her in the right framework.

I decided at that point I didn't want to work on the case any more. I felt our firm had been tricked into accepting a lawsuit which had a fraudulent base. Our firm would never do anything like that. I felt that these people in Florida, whoever they were, had done something very disreputable.

We had stumbled along and gotten into the case, invested a lot of money. We were spending money, great amounts of

money here. We were committed to going forward with this case. We have got a lot of money invested, millions of dollars riding on the verdict, and here from the very inception of the case there had been fraud on the part of the Florida law firm.

I began to dislike the case and not want to work on it. • • • •

[121] • • • • Q. Now before you made the two calls to Davis, Polk which are reflected in Exhibit A and Exhibit B did anyone approach you and suggest to you that you ought to make those calls? A. No, never.

Q. Did anyone in effect bribe you to make those calls? A. No. As a matter of fact, prior to this you could not have bribed me to make these phone calls for the simple reason for no amount of money would I have gotten myself in so much trouble. Look at this all here. It's terrible. • • • •

[134] • • • • Q. Now, after the meeting with Mr. Ryan and Mr. Barnes on the afternoon of Thursday, December 23, 1982, and putting aside any communications or meetings that you may have had with your counsel, what was the next time that you talked with anyone respecting these disclosures? A. Over the weekend. I got to thinking, I am sitting in my little apartment and I am thinking, trying to weigh the pros and cons of what's likely to result if I continue with my course of angry action.

I came to the conclusion that all hell might break loose, that maybe as angry as I was with the firm, I should try to undo the damage.

I may have wanted to kick somebody in the shins, but I didn't want to sink the whole ship. I **[135]** didn't want to blow the whole lawsuit out of the water. How can I undo the damage I have done? Poor Nick, poor Jim—not poor Jim, but poor law firm. I felt really bad and I decided that maybe I better keep the lid on all this and try to undo the damage I had done, and go back on my statements to Ryan and Barnes.

I panicked at the thought of the extensive damage that might be done not just to the Koller case but to the law firm, because here I am revealing that in my opinion they have engaged in a

course of fraudulent conduct on the court, and I thought that might get blown out of proportion, all kinds of examinations might take place, or even their license to practice law might be challenged.

I thought, I thought over the weekend about the fact that all I wanted to do was make a phone call or two, register my anger, and register a cheer for Davis, Polk, you are on the right track, you are looking in the wrong places. I never intended to have this pop up at the door like jack-in-the-box. I better squash this while I can.

I thought about it over the whole weekend, and I called my office, the office of the Butler firm on Sunday evening after I tried to reach Nick Allis at home. I thought that I will talk to Nick first and privately, and I will ask him, you know, I have jumped **[136]** into the frying pan; get me out.

Nobody answers at home. Nick has got the answering service. I am not going to leave a message on the answering service. I have to talk to a human being.

Another person of judgment and calm head in the firm, Richard Daum. I tried calling Richard Daum at home in Culver City.

No answer.

I figured if Nick is not at home, he's got to be at the office. That's virtually the only place he would be, in the office or at home.

I called the office, and to my delight Richard Daum answers. At least somebody is there besides the answering service. I said something to the effect, "Richard, I am in a hell of a situation. I have got to talk to Nick. Let me talk to Nick."

Richard informs me Nick is not here. "As a matter of fact, I am here. Can I do anything for you? Can I take a message?"

I am thinking to myself, I had expected to get Nick Allis personally. If I had gotten Nick Allis personally, I could tell Nick I had made a phone call to Davis, Polk. I am not going to admit a lot of things that make me look real bad to a junior member, a new member of the firm, a paralegal.

I am thinking as fast as I can, and I **[137]** decided I will lie. I am not going to say that I made the call to Davis, Polk

voluntarily. I will admit that I called Davis, Polk, and I will admit that I gave them damaging information, but I won't admit I did it voluntarily. I will pretend that I was tricked into it, pressured, so I invented a story about somebody having approached me and said they were from Davis, Polk, and threatened me if I didn't cooperate with them I would be sorry.

I invented some fantastic story, and in the middle of the story I was telling Richard I got the truth across, I have talked to Davis, Polk, I have given them some damaging information about what's going on within our firm. I want to backtrack. I wanted to discredit myself, I want to undo the damage. Let's present a united front.

I may not have used those exact words. What I was saying, let's get together and undo the damage I have done.

Richard Daum didn't take me seriously. Maybe my story was too fantastic, I don't know.

Also, maybe Richard Daum wasn't aware what I might have told the firm of Davis, Polk was so explosive.

Richard Daum has only been with the firm for, I am sure, less than a year; certainly was not a **[138]** party to any of these early meetings, strategy meetings in 1981.

Now, of course, you know that Richard Daum is with the firm, he partakes very strongly in all of the attorney meetings because he's our head paralegal, but he seemed not to be concerned.

I asked him, "Find Nick Allis. We can't let this wait overnight."

He said Nick Allis was not there and he said he would try to track Jim Butler down or Nick Allis down.

I impressed on him to find Nick Allis. If he is not at home, he might be with one of his girl friends. I didn't think it could wait until Monday morning.

As you see, I was calling on Sunday night, trying to erase the damage I had done. So much for that night. • • • •

[154] • • • • A. Yes, he was there in the morning from about 10:15 or 10:20 until sometime after 12:15, maybe close to 12:30. And he said he wanted to go back to the office. I

don't recall exactly what his words were but he was going back to the office to work on this problem.

He called me again at the hospital about 3:30, said that he had put his head together with Jim Butler and they had come up with a way to mitigate the possible disastrous consequences of my contact with Davis, Polk.

Nick asked me if I would be willing to sign a statement and I took into consideration all the factors. I didn't want to sign a false statement to the effect that I never had any conversation with Mrs. Koller. I wanted to compromise and sign a statement saying I don't remember ever having had any such conversation. But Nick took a very strong position that in order to undo the damage of my contact with Davis, Polk nothing less would do than a complete contradiction, **[155]** a complete retraction of my original statements. Nick said that they were preparing a statement which would be adequate, they felt, to undo the damage, a complete retraction and they might have it ready and bring it by that evening. • • • •

Memorandum Opinion of the District Court Excluding Evidence of Cordova and Sand Filed January 17, 1983

FILED—Jan 17 1983—James F. Davey, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1258

ANNE ELISABETH KOLLER, *et al.*,

Plaintiffs,

v.

RICHARDSON-MERRELL, INC.,

Defendant.

MEMORANDUM OPINION

This matter is before the Court on defendant's motion to exclude all evidence of the birth defects of Marco Cordova and Pauline Sand, two children on whose behalf plaintiffs' attorneys have filed suit in the California state courts for injuries allegedly caused by the drug Bendectin. Because Anne Koller's birth defects also allegedly were caused by Bendectin, plaintiffs plan to have their experts testify that one of the reasons for their conclusions that Anne Koller's birth defects were caused by Bendectin is their examination or review of the case histories of Marco Cordova and Pauline Sand. For the following reasons, the Court will preclude plaintiffs from making any use of the birth defects of the Cordova and Sand children.

Regardless of plaintiffs' intention to employ the Cordova and Sand defects only to buttress their experts' conclusions concerning the cause of Anne Koller's birth defects, there is a significant danger that the introduction of *any* information concerning the Cordova and Sand defects would result in a *de facto* trial of the Cordova and Sand suits. Permitting defendants to exercise their right to cross-examination undoubtedly would force the consideration of a myriad of collateral issues relating to the family histories, medical histories, genetic analyses, and course of pregnancy of the Cordova and Sand children. Plaintiffs attempt to justify their use of this information by analogizing it to the epidemiological studies that defendant plans to employ. Plaintiffs' analogy is seriously flawed, however, because epidemiological studies are conducted pursuant to a scientific methodology which impersonally compares a large group of children whose mothers took Bendectin against another large group of children whose mothers never used the drug. In contrast, the two children whose birth defects plaintiffs seek to cite are among a large group of children who suffered birth defects and whose mothers coincidentally took Bendectin. The Court is unwilling to grant plaintiffs a license to submit the birth defects of children whose only demonstrable relationship to Anne Koller is that they have suffered birth defects that are superficially

similar to those of Anne Koller.* Hence, the substantial danger of the introduction of collateral issues which would confuse the jury and obfuscate the issues strongly supports the exclusion of any reference to the birth defects of Marco Cordova and Pauline Sand. Moreover, reference to the birth defects of other children would be highly prejudicial to defendant since it would be effectively compelled to defend against the Cordova and Sand suits in addition to Anne Koller's claim.

That plaintiffs are willing to use the birth defects of the Cordova and Sand children solely to support their experts' opinions of the causation of Anne Koller's birth defects does not alter the foregoing analysis. Federal Rule of Evidence 703 permits experts to rely on inadmissable evidence if it is the type of evidence upon which experts in that field traditionally rely. Therefore, the Court must determine if medical experts would reasonably rely on the birth defects of children with similar physiological problems to Anne Koller in concluding that her defects were caused by Bendectin. While it may be possible to point to similar injuries that concededly were caused by a drug to suggest that another individual's injuries were caused by the same drug, the critical point in the instant case is that it has never been proven** that the Cordova and Sand children suffered birth defects due to Bendectin. Thus, plaintiffs will not be permitted to rely upon similar accidents to bolster their view of the cause of the instant accident where it is far from clear that the "similar" accidents were even caused by the same event that allegedly caused the instant accident. Attempting to

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* Under the same ill-found reasoning advanced by plaintiffs, defendant should be entitled to introduce evidence of the birth defects of the Mekdeci child to demonstrate that Bendectin did not cause Anne Koller's birth defects.

** Neither the Cordova nor the Sand suits have been tried. Moreover, defendant has consistently maintained that Bendectin is not a teratogen. Since a court of law has yet to find that Bendectin causes birth defects, it would be a particularly unreasonable decision to permit jurors to infer that Bendectin causes birth defects from other unproven claims that are no more strongly supported than plaintiffs' suit.

base a determination of the causation of a birth defect on the unconfirmed cause of birth defects in other children is, at best, no more than wishful thinking. Accordingly, the Court finds that medical experts would have no reasonable basis to rely on the Cordova and Sand birth defects to support a conclusion that Anne Koller's birth defects were caused by Bendectin.

Assuming *arguendo* that medical experts could reasonably rely on the birth defects of the Cordova and Sand children, any reference to these defects still must be barred. Despite the allegedly limited use of the Cordova and Sand defects by plaintiffs' experts, there is no basis upon which the Court could prevent the introduction of collateral issues, particularly given the serious questions concerning whether the Cordova and Sand birth defects were caused by Bendectin. Finally, the Court rejects plaintiffs' attempts to have the Court place its blind faith in their highly trained experts in trusting them to list every factor that contributed to their conclusions that Anne Koller's birth defects were caused by Bendectin. It is quite clear from the present record that there are an array of factors that plaintiffs' experts will claim that provided their foundation for the conclusion that Bendectin caused Anne Koller's birth defects. Preventing plaintiffs from listing their examination of the case histories of the Cordova and Sand children will have no appreciable impact on the effectiveness of the presentation of plaintiffs' case. In balancing the positions of the parties, together with the earlier articulated serious concerns—including jury confusion—it is necessary that the experts to be called by plaintiffs be barred from making any reference to the birth defects of the Cordova and Sand children.

An Order consistent with this Memorandum Opinion will be entered this date.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

DATE: January 17, 1983

Order of the District Court Excluding Evidence on Cordova and Sand Filed January 17, 1983

FILED—Jan 17 1983—James F. Davey, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1258

ANNE ELISABETH KOLLER, *et al.*,
Plaintiffs,

v.

RICHARDSON-MERRELL, INC.,
Defendant.

ORDER

Upon consideration of defendant's motion to exclude any evidence of the birth defects of Marco Cordova and Pauline Sand, plaintiffs' opposition, the accompanying memoranda of law, the argument of counsel, and the entire record herein, it is this 17th day of January, 1983,

ORDERED that defendant's motion be, and hereby is, granted.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

Affidavit of Carol Freeman Filed January 18, 1983

United States District Court
for the District of Columbia

STATE OF TEXAS:
COUNTY OF HARRIS:

My name is Carol Freeman. I am over the age of eighteen (18) years of age. I am employed by Richard Warren Mithoff, as a secretary, with the firm of Jamail, Kolius & Mithoff at 3300 One Allen Center, Houston, Texas 77002.

On Monday, December 27, 1982, I received a call from Krystyna Janowski. During the course of the conversation Krystyna told me that she had been contacted by the defense—an investigator—in the *Koller* case. She had his card. The investigator wanted her to remember a telephone conversation which had been transcribed. Krystyna told me she didn't remember the conversation because the conversation had never taken place. She also told me that they had offered her money to testify: $5,000.00 now, $5,000.00 when she testified and $5,000.00 afterwards. We discussed it being a lot of money. I asked Krystyna where they had contacted her and she told me once outside of the hospital and once at her home, and that she didn't know how they got her home address. They knew that she had a new baby and that the baby was in the hospital and that she had some expenses. They had made reference to the expenses. I told her she needed to tell Nick and if the defense or anyone else wanted to talk to her she should not talk to them, unless of course she was served with a subpoena.

THE ABOVE AND FOREGOING IS TRUE AND CORRECT.

/s/ CAROL FREEMAN
Carol Freeman

SUBSCRIBED AND SWORN TO this the 17th day of January 1983, to certify which witness my hand and seal of office.

/s/ CAROL H. YARBROUGH
Notary Public in and for
The State of Texas

My commission expires:

CAROL H. YARBROUGH
My Commission Expires September 11, 1985

Excerpts from United States District Court for the District of Columbia Hearing Transcript of January 18, 1983

[20] THE COURT: • • • •

In fact, Mr. Eaton asked me on Friday if the jury would be coming in today. I told him, specifically I had told the jury officer not to bring the jury in Monday or Tuesday, that I would do my pretrial before I had the jury brought in for impaneling in this case. But you are correct, I do perceive that some issues have arisen which may impact somewhat on the trial date, but as all of you gentlemen know, I have set aside the full months of January, February and March on my calendar for the trial of this case. • • • •

[34] • • • • MR. BUTLER: Your Honor, we feel that not only should that have been done but also independent counsel appointed for this woman.

THE COURT: Well, let me say this to you, Mr. Butler. I know your position on that. I have read your papers on that, and I would quite agree with you that it might have been worthwhile to get independent counsel, but neither you, Mr. Madole nor anyone else offered this Court **[35]** one penny to pay independent counsel for the lady.

Secondly, I was sending a special master out to conduct this deposition, and based upon what I have read of the transcript, the deposition was conducted—

MR. BUTLER: Was what?

THE COURT: The deposition was conducted by the special master. Based upon my reading of the transcript, it was conducted by the special master.

To my knowledge, this lady needed no counsel during the taking of that deposition, unless that counsel felt that something she might say or some question that was asked of her would elicit the type of information that she might have a Fifth Amendment right not to speak on, and based upon what I have been able to read, this lady was examined by Mr. Struve and cross-examined by Mr. Campbell and the counsel who she said she wanted to represent her during the course of that proceeding—

MR. BUTLER: Your Honor, counsel—I'm sorry.

THE COURT: The counsel who she said she wished to represent her during that proceeding did no more than represent her interest. It did not have anything to do with the issue before this Court. And, as I said, whether you agree or disagree, the full matter was put before me. I read papers from both sides and I did what any judge does. I made a decision. So, it's been made, all right.

[74] • • • • THE COURT: Well, thank you, but let me say this. With respect to the attorney/client privilege, why don't you gentlemen let me look into it with respect to all witnesses except Janowski and Castillo, because I do believe that what Mr. Madole stated in here on the record that day related primarily to Janowski and Castillo. I will review the transcript. I will also review the case law on that issue, but I am reopening discovery now for the limited purpose of any further deposition of Mrs. Koller that you choose, of any further deposition of Mr. Koller that you choose, of any further deposition—not further deposition but any **[75]** deposition of Mr. Humphries.

Now, are those the only people you asked for?

MR. WALSH: The only three we asked for. We suggested the addition of Rochelle Beeber, but that's a belated addition.

THE COURT: I think before I move—well, let me get these names down. I think with respect to the—I forget the last name already but the first name was Rochelle.

MR. WALSH: Rochelle Beeber, B-e-e-b-e-r.

THE COURT: I think I'd better get something in writing on that before I consider that. I will hear from you and then I will hear from the other side with respect to Beeber.

Now, as far as Mr. Butler is concerned, Mr. Butler wants to depose Barnes.

MR. BUTLER: Larson.

THE COURT: You say husband and wife?

MR. BUTLER: That's right.

THE COURT: What are the first initials?

MR. BUTLER: George and—what is Mrs. Barnes' first name?

MR. WALSH: I don't know—Nancy.

THE COURT: George and Nancy Barnes you asked for. Who else?

MR. BUTLER: And Mr. Larson.

[76] MR. WALSH: Lawrence Larson. I think he calls himself Larry Larson.

THE COURT: All right.

MR. BUTLER: Larry Larson. Your Honor, we served a subpoena on Upjohn with respect to her employment record. I think that that is important. She was with Upjohn before she came with me. • • • •

[85] • • • • Based upon the frame of mind I was in, I thought we should just start with the pretrial today, but I sort of get the impression that you would prefer not to, Mr. Butler. Am I correct?

MR. BUTLER: That's correct, Your Honor. I would want to get this matter out of the way, the matter of Krystyna Janowski, before we proceed.

THE COURT: Do you have any objections to my just pushing this over until the end of next week?

MR. WALSH: None at all, Your Honor. We are ready to accommodate any suggestion Your Honor has or any scheduling order Your Honor has.

THE COURT: All right. Assuming—I'm not assuming. I'm sure the deposition of Ms. Janowski and Mr. Castillo will be

over by the 28th of January. I'm sure of that. Already Mr. Coleman has indicated that he is sure he can finish in two days, and I would doubt if Mr. Castillo's deposition would take two days. But, at any rate, assuming that it will be over on that date, your next day in this courtroom will be Monday, January 31st. • • • •

Memorandum Opinion of the District Court Affirming Ruling Regarding Attorney-Client Privilege Filed January 19, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED—Jan 19 1983—James F. Davey, Clerk

Civil Action No. 80-1258

ANNE ELISABETH KOLLER, et al.,

Plaintiffs,

v.

RICHARDSON-MERRELL, INC.,

Defendant.

MEMORANDUM OPINION

This matter is before the Court on plaintiffs' assertion of the attorney-client privilege with respect to discussions between plaintiffs and their attorneys concerning when Cynthia Koller ingested the drug Bendectin during the course of her pregnancy with Anne Koller. Plaintiffs appeal the ruling of this Court's Special Master, the Honorable Gerard D. Reilly, Chief Judge, Retired, District of Columbia Court of Appeals, that plaintiffs no longer possess an attorney-client privilege with respect to any of the aforementioned discussions. Whether as a matter of

the law of the District of Columbia or California,* this Court affirms the Special Master's ruling on two independent grounds: 1) The exception to the attorney-client privilege for an alleged fraud upon the Court is clearly applicable; 2) Plaintiffs' selective waiver of the attorney-client privilege with respect to one alleged critical discussion had the legal effect of totally waiving the privilege. While the Court will not tolerate a fishing expedition into the strategies of plaintiffs' attorneys in this litigation, the Court holds that plaintiffs possess no attorney-client privilege to prevent the disclosure of any discussions relating to the issue of when Cynthia Koller took Bendectin during her pregnancy with Anne Koller. The Court and the litigants are entitled to a full inquiry into the serious allegation that a fraud has been committed upon the Court.

Before discussing the two grounds for this Court's holding, it is necessary to discuss briefly why Cynthia Koller's alleged communication with Krystyna Janowski normally would be protected by the attorney-client privilege. Ms. Janowski was a legal secretary for one of plaintiffs' attorneys when her alleged discussion with Ms. Koller occurred. There is no doubt that Ms. Koller was willing to share her thoughts with Ms. Janowski because Ms. Janowski was an agent for one of her attorneys. Accordingly, a conversation between a client and her attorney's agent should be privileged. Defendant's only argument to move this alleged conversation outside the normal scope of the attorney-client privilege is unpersuasive. Defendant relies on several cases in which an attorney hired a consultant or investigator who concluded that the client's case had no merit. These conclusions were found to be unprivileged since they were not obtained for the purpose of obtaining legal advice. *See, e.g., Jasper Construction, Inc. v. Foothill Junior*

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* It is likely that the controlling law is from the District of Columbia since the District of Columbia is the forum state and has a substantial interest in governing the conduct of attorneys who appear in its courts. Nevertheless, it is unnecessary to make a substantive ruling on this conflicts of law issue since the laws of the District of Columbia and California compel the same result.

College District, 91 Cal. App. 3d 1, 153 Cal. Rptr. 767 (1st Dist. 1979). The instant case is readily distinguishable, however, because it is one of the plaintiffs, not an agent hired by the attorney, who allegedly has made statements that would undercut the case and that would suggest that a fraud has been committed upon the Court. Although the link of Ms. Koller's alleged comments to the pursuit of legal advice is somewhat attenuated, the fact that Ms. Koller's alleged statements were made to an individual whom she knew was her attorney's agent during a visit to that attorney's law firm should, under normal circumstances, shield Ms. Koller's comments from disclosure.

The first reason why the protection of the attorney-client privilege must be removed is that the privilege cannot be employed to thwart an inquiry into allegations that a fraud has been committed upon the Court. In the instant case, Ms. Janowski has made serious charges that at least require some further inquiry. The seriousness of these charges* combined with a record that indicates that certain documents that would help answer when Ms. Koller did take Bendectin are unavailable strongly support the conclusion that this case squarely fits within the fraud exception to the attorney-client privilege. Otherwise, any further inquiry into Ms. Janowski's charges could be blocked by the assertion of attorney-client privilege. Where the Court cannot conclude that allegations of fraud are frivolous or manufactured, the fraud exception to the attorney-client privilege must be applied to permit a complete investigation of the charges.

Plaintiffs' attempts to avoid the application of the fraud exception are ill-founded. Plaintiffs cite a California decision for the proposition that there is no exception to the privilege when an attorney misuses confidential information to defraud others where there is no allegation that plaintiffs ever had a fraudulent motive in employing their attorneys. *See Glade v.*

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* Of course, the seriousness of a charge of fraud alone does not necessitate the application of the fraud exception if the charge appears frivolous. Yet, the Court is not in a position to find Ms. Janowski's charge either frivolous or manufactured at this time.

Superior Court, 76 Cal. App. 3d 738, 143 Cal. Rptr. 119 (3d Dist. 1978). While this legal proposition may be true, it is wholly inapplicable to the instant case where Ms. Janowski has alleged that a plaintiff, Ms. Koller, has intentionally committed a fraud upon the Court by falsely claiming that she took Bendectin during the critical period for limb development.* Plaintiffs also maintain that the fraud exception is inapplicable since plaintiffs did not have a fraudulent motive in seeking legal advice. Yet, the fraud exception applies during the entire course, not merely at the inception, of the attorney-client relationship. Regardless of plaintiffs' attitude when they first obtained counsel, Ms. Janowski has alleged that Ms. Koller admitted that at some point she falsified her claim regarding when she ingested Bendectin during her pregnancy.**

An independent basis for not honoring the attorney-client privilege is that plaintiffs' selective waiver of the privilege mandates that the privilege is completely waived with respect to the issue of when Ms. Koller took Bendectin. In a hearing before the Court on January 4, 1983, plaintiffs' counsel waived the attorney-client privilege for Ms. Janowski's alleged conversation with Ms. Koller concerning when Ms. Koller first took Bendectin. That selective waiver opens the door to a full exploration of the subject matter of the conversation through an inquiry into any other discussions that Ms. Koller may have had with her attorneys or their agents regarding this subject. There is ample authority that selective waiver of the attorney-client privilege effectively waives the privilege entirely for the subject matter of the selective waiver. *See, e.g., United States*

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* Moreover, the *Glade* decision required that the client was unaware of the attorney's wrongdoing. This contrasts starkly with Ms. Janowski's allegations that suggest that Ms. Koller initiated or at least fully cooperated in the alleged fraud.

** Plaintiffs' assertion of the work-product privilege must be rejected for the same reasons as the attorney-client privilege must not be recognized. The fraud exception necessarily extends the work-product privilege, a privilege which is arguably deserving of less respect than even the attorney-client privilege.

v. Woodall, 438 F.2d 1317, 1324-24 (5th Cir.) (en banc), *cert. denied*, 403 U.S. 933 (1971); *Handguards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 929 (N.D. Cal. 1976); *Edmund J. Flynn Co. v. LaVay*, 431 A.2d 543, 551 (D.C. 1981). Plaintiffs' argument that a complete waiver should occur only when there is an "offensive" selective waiver is meritless. A distinction between the "offensive" and "defensive" use of otherwise privileged materials, however, is meaningless. The principle that selective waiver completely waives the privilege for the subject matter of the selective waiver emanates not from the manner in which the selective waiver is employed, but rather from a strong sense of fundamental fairness. Once counsel opts to disclose some privileged information about a particular issue, additional disclosure is essential to permit a full consideration of the issue.

An Order consistent with this Memorandum Opinion will be entered this date.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

Date: January 19, 1983

Order of the District Court Affirming Ruling Regarding Attorney-Client Privilege Filed January 19, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED—Jan 19 1983—James F. Davey, Clerk

Civil Action No. 80-1258

ANNE ELISABETH KOLLER, et al.,
Plaintiffs,

v.

RICHARDSON-MERRELL, INC.,
Defendant.

ORDER

Upon consideration of plaintiffs' motion to reverse the ruling of the Special Master that the attorney-client privilege is inapplicable to any conversations concerning the issue of when Ms. Koller took Bendectin during her pregnancy with Anne Koller, defendant's opposition, and the entire record herein, it is this 19th day of January, 1983,

ORDERED that the Special Master's ruling be, and hereby is, affirmed; and it is further

ORDERED that this ruling shall apply to all other depositions and testimony that will be taken to explore whether a fraud has been committed upon the Court.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

Excerpts from Deposition of George Barnes Held on January 25, 1983

GEORGE BARNES, called as a witness by the Plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Eaton

[62] • • • • Q. Prior to December 22, 1982, had you ever seen Krystyna Janowski? A. No, sir.

Q. Had you ever spoken to her prior to December 22nd? A. No, sir.

Q. Had you ever spoken to any person from the Butler firm, to the best of your knowledge, prior to December 22nd? A. Not to the best of my knowledge, sir.

[119] • • • • Q. Who were the people who carried out the surveillance? A. Myself, Richard Harrison. That's it.

[120] • • • • Q. And was this 24 hours a day? A. No.

Q. How many hours a day, approximately, sir? A. It's hard to say. Probably less than eight.

Q. Less than eight hours? A. I would think so, except on the 3rd, it was considerably longer.

Q. Was it all done from the one vehicle? A. No, no, we used various vehicles because the neighborhood is difficult to work in, and we had obtained authority to rent a camper, a recreational-type vehicle that we could sit in and there were restroom facilities there. So, we could be there relatively early in the morning and be able to maintain that position. We were not to follow her or anything, just make sure that nothing happened, and not impose upon her.

[II-48] • • • • Q. To your knowledge, have any payments been made to Ms. Janowski or to any other person on her behalf for subsistence or payment of medical expenses? A. By the Defendant?

Q. Or any person or related person acting on its behalf. A. I want to make sure that I understand your question because it's a serious question.

Q. Yes, sir. A. Do you want me to repeat it as I understand it?

Q. Yes, sir, that might be worthwhile. A. As I understand, you're asking me whether or not the Defendant or any of its agents at any time— Q. Or attorneys, agents or attorneys. A. —or attorneys offered subsistence, medical payment, or any other kind of payment to Krystyna Janowski. That's the question?

Q. Yes, sir. **[II-49]** A. No, sir, I have no knowledge of that. I did write one check to Krystyna Janowski.

Q. And that was for the witness fee? A. Yes, sir. $40.

Q. Did she ever express any need to you other than what you've previously described on the 27th and on the 3rd? A. No, sir, not a need that she would even imply that we could fulfill. • • • •

Excerpts from Continued Deposition of Krystyna Janowski Held on January 27, 1983

Cross Examination by Mr. Coleman

[1223] THE WITNESS: Counsel, you are asking about money. I have not received any money, but stop me if I am saying something I shouldn't—

JUDGE REILLY: Wait a minute.

MR. SCHUCK: I am going to make a statement for the record on this subject which I think might help everybody. I wrote a letter under date of January 5, 1983, a copy of which I will be glad to have marked, addressed to Mr. Butler, Mr. Coleman, Mr. Walsh and Mr. Lewis in which I stated, among other things: "Gentlemen, please be advised that in addition to representing Krystyna Janowski I was also asked by Luis Castillo to act as his attorney and I accepted."

Then there is a paragraph about asking people not to contact these folks.

There is a final paragraph: "This confirms my suggestion to Messrs. Coleman and Walsh yesterday made yesterday that the parties share Ms. Janowski's actual living expenses until she can find new employment, hopefully within a month or two.

She is now without income, has no savings, and is confronted with a desperate situation in connection with her still-hospitalized baby. I explained I would be amenable to any reasonable way of monitoring the distribution of funds. I would appreciate your response to this suggestion."

[1224] I will represent that subsequent to this time, and as I told everybody here, I have not told Ms. Janowski where the money was coming from so as not to make her favor one side or the other, but I will say that through my auspices I have arranged for her to be in an apartment, in a security apartment facility to protect her from being harassed.

I have also arranged for her to have a rental car because she was being followed even by a Winnebago in the other car that she had so the people could chase around the other car all they wanted.

And thirdly, I arranged to advance the funds of about three or four hundred dollars in order to get for her baby a cardiac monitor and apnea monitor mattress so the baby could come out of the hospital because the baby was actually having cyanotic spells and stopping breathing, and I arranged for that.

I expect to be reimbursed out of the insurance money when it comes. I believe on the apartment her mother—and incidentally, the baby care right now when she is involved here is strictly being taken care of by her mother who has flown out here, not at our cost or anything. Ms. Janowski has taken care of it. I believe when her mother arrived here, her mother advanced some $50 to make a deposit on this **[1225]** security apartment. That as well as the deposit on the thing has been taken care of through my auspices. I am not going to tell Miss Janowski where that money is coming from on one side or the other but I have suggested it to both.

Now I think I have covered it 100 percent. Have I stated it correctly?

THE WITNESS: In the meantime I am still incurring all the regular costs.

MR. SCHUCK: Beyond that, she still has her present apartment on Bixel Street. She has all of the expenses. Not one

penny of that Bixel Street Apartment rental has been taken care of through my auspices. Not one penny of plane fare has been taken care of, and that's the actual situation.

MR. COLEMAN: Judge, I want to know how much money that she has received from outside sources in this case.

MR. SCHUCK: I haven't given her any.

THE WITNESS: But I have received funds. * * * * * * * * MR. SCHUCK: I will be very happy when I have the figures to put them in the deposition.

I can say right now as a wild guess, it probably ran at an average level for the apartment facility, facilities, an average of about $35 a day. That's a crude average. I don't know what the rental-car cost is. I haven't even gotten the bill yet.

What the blanket cost is, somewhere in the area of $400. I don't even know what the amount is. I didn't handle these things.

[1227] MR. COLEMAN: Is there a month's lease on the apartment or longer lease?

MR. SCHUCK: I don't even know that.

MR. COLEMAN: Is the monthly rent on the apartment in excess of $1,000?

MR. SCHUCK: No.

MR. COLEMAN: $35 a day for the apartment comes out to over $1,000 a month.

MR. SCHUCK: She says it is 615 a month.

MR. COLEMAN: How much was the rent on the Bixel apartment?

THE WITNESS: It still is. 210 a month. I have to pay that every month. I am going back there whenever this gets over with.

Q. BY MR. COLEMAN: Do you have a driver's license?

A. Of course. California. I have it with me, if you would like to see it.

MR. SCHUCK: No. Don't volunteer.

Q. BY MR. COLEMAN: What kind of a car do you own?

A. I still own—

MR. STRUVE: Your Honor, I question the relevance this kind of intrusion into the witness' personal life.

MR. COLEMAN: She is being financed as a **[1228]** professional witness and I can't inquire into it?

MR. SCHUCK: That is ridiculous, and I resent it.

MR. COLEMAN: It is not.

MR. SCHUCK: She needs protection because people were on her back—

MR. COLEMAN: That's not true, not our folks.

MR. SCHUCK: Absolutely true.

MR. COLEMAN: Not true.

MR. SCHUCK: That woman needs protection. She had a baby that was dying and I took care of her.

MR. COLEMAN: She didn't need protection. She needed independent counsel and she didn't get one. She got one paid for by the defense, and she is getting an apartment—who paid for this stuff?

MR. STRUVE: Your Honor, would you ask counsel to control his—

JUDGE REILLY: Yes, yes, please calm down.

MR. COLEMAN: May we take a break, Your Honor?

JUDGE REILLY: Yes.

MR. COLEMAN: Five minutes.

(Brief recess.)

MR. COLEMAN: Your Honor, may we proceed?

JUDGE REILLY: Yes, proceed, Mr. Coleman.

MR. COLEMAN: Your Honor, I do want to get on the record who was making these payments, because I don't think it takes very much guesswork on the witness' part **[1229]** to figure that out. So I do want it on the record, who is making these payments.

MR. SCHUCK: If you want it, then I will say it. The plaintiffs' side is not contributing. It is made, I guess—I will be sending the statements to Lawrence Walsh, who I guess is not with Davis, Polk but he is with—

MR. STRUVE: Crowe & Donlevy.

MR. SCHUCK: —Crowe & Donlevy.

MR. COLEMAN: I think we should be informed how much money is being spent, and I think Mr. Schuck did agree to do that.

MR. SCHUCK: I certainly will. Leave a space here and I will give you an accounting of—

MR. COLEMAN: Thank you, sir.

MR. SCHUCK: —of the disbursements for those purposes through my auspices. • • • •

Redirect Examination by Mr. Struve

[1277] • • • • Q. Could you tell us where you can identify the things that are left out? A. Yes. On the bottom of the page 9 where it says "end side 1 of tape." And then again at the bottom of page 16 where it says "end of tape." There was considerable conversation in both of those areas.

Q. Could you give us to the best of your recollection the conversation that took place between pages 9 and 10. A. Yes. Floyd had gone out of the apartment. I assumed he went downstairs to his car. He was gone such a length of time that I assume he had gone to the corner to use the public telephone, and I asked Nick **[1278]** whether I was doing all right, was this going the way he wanted to, because we had an agreement in the afternoon that he was going to bring by.

MR. STRUVE: Could I ask that counsel not be reacting the way he is to the witness' testimony.

JUDGE REILLY: Yes. Please let the witness—

MR. STRUVE: I am sorry, I interrupted, Miss Janowski. Could you continue.

THE WITNESS: Yes. Nick and I had made an arrangement between ourselves in the afternoon that in exchange for this document I would be kept on the company payroll, my checks would continue indefinitely, I would not have to go to the office, my insurance benefits would continue. A promise was made that no retribution or vindictiveness would be displayed to me for the trouble I caused for the firm, et cetera.

When Floyd left the room I grabbed the opportunity to talk privately.

"Nick are you sure that you are going to keep your part of the deal in exchange for signing this paper? I am not going to have any more problems and is this okay?"

I was confirming during this conversation what I had agreed to with Nick in the afternoon; namely, he was going to come by with a third party in front of whom Nick and I would put up a united front so that **[1279]** they would have a document with which they could defend themselves against the charges by Davis, Polk, and the moment Floyd left the room I grabbed that opportunity to discuss with Nick, "Look, am I doing okay? I am keeping my part of the deal. Will this really end the problem?"

And subsequently we got into discussing again the problems that I had had in the office, and Nick brought up the subject of, "My God, you know, what cracked you to the point where you would actually pick up the phone, call the enemy?"

I launched into a recounting once again of my complaints for several minutes, and by the time Floyd came back in the room, we were talking again about my problems with the law firm, and the side two picks up at that point where Floyd walked into the apartment again, but what's interesting to me is that apparently both sides— • • • •

[1288] THE WITNESS: The statement was that they would destroy me with my own past. That was the threat made to me.

Q. Who made that threat to you? A. It wasn't phrased as a threat. It was a warning. It was more of a warning than it was a threat. On the afternoon of the 27th Nick warned me that I had to cooperate. I felt very pressured, and he said you've got to cooperate because if you don't cooperate with the firm and put up a united front they will bring up everything they can dig up from your past and they **[1289]** will destroy you with it. I was aware that I had a very unsavory past and I was very intimidated with that, and I agreed that I would sign whatever paper he would bring to my apartment, including a blank piece of paper. • • • •

Excerpts from Exhibit 76 to Deposition of Krystyna Janowski Held January 27, 1983*

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

No. CR 9338

March 25, 1966

THE PEOPLE OF THE STATE OF CALIFORNIA

vs

CRYSTAL DAWN HICKS

PROBATION OFFICER'S REPORT

COMPLAINT:

On March 11, 1966, defendant entered a plea of guilty of a violation of Section 245 PC (Assault with a Deadly Weapon) and is at liberty on bail of $1,500 pending a probation hearing scheduled for March 25, 1966.

COUNT FOUR of a Complaint filed February 10, 1966, charged that on February 8, 1966, the defendant did assault Kathleen Helena Smith with a deadly weapon.

Counts One, Two, Three, Five and Six of the Complaint were dismissed in the furtherance of justice.

* This exhibit material was placed under seal by the Special Master presiding over the deposition of Ms. Krystyna Janowski, The Honorable Gerard D. Reilly, Retired Chief Judge, District of Columbia Court of Appeals. Respondents reprinted portions of this exhibit in the Joint Appendix submitted to the Court of Appeals below without obtaining an Order unsealing it. They likewise have designated the following portions of this exhibit for inclusion in the Joint Appendix herein.

Counts One, Two and Three charged that on February 8, 1966 the defendant did assault Daniel Allen Smith, Janice Elizabeth Smith, and Joseph Henry Marquette, with a deadly weapon.

Count Five charged that on February 8, 1966, the defendant did disturb the peace and quiet of the neighborhood of 6465 Seascape by offensive conduct and the use of indecent language in the presence of women and children.

Count Six charged that on February 8, 1966, the defendant did injure or destroy certain property belonging to Kathleen Helena Smith.

The defendant was arrested on February 8, 1966, and posted bail on February 12, 1966, thus spending four days in custody.

• • • •

FACTS OF THE OFFENSE:

On February 8, 1966, at about 2:30 in the afternoon, Kathleen H. Smith reported to police that her house at 6465 Seascape had been entered and extensive damage had been done to the windows, doors, walls, household furnishings and general household interior. She also reported that while discussing the matter with her landlord, Mr. Floyd Hicks, his wife, Crystal Dawn Hicks, tried to run down with her automobile Mrs. Smith, Mrs. Smith's two children, ages five and three and Mrs. Smith's small brother, Joseph Marquette, age three.

Mrs. Smith's mother and father, Mr. and Mrs. Edward Marquette, first noticed that the offense was being committed. At about 11:00 or 11:30 in the morning of February 8 they had driven to their daughter's home. There was a car parked in the driveway as they sat outside in their own automobile and waited for a while. After a few minutes, a woman came out of the house, looked at them and then went back into their daughter's home.

• • • •

ADDITIONAL INFORMATION:

The husband states that she really needs psychiatric help. He never really wanted to commit her, and states that Dr. Irving Stone, psychologist, said that defendant should not be confined in a mental institution because of her past record of institutionalization and that she would continue to reject help if institutionalized. He will pay for continued psychiatric treatment. In view of the marital history, the Probation Officer inquired whether or not he would be willing to put some money in a trust fund for paying of such treatment. The husband called at a later time to inform the Probation Officer that he thought he could place approximately $600 in such a trust fund, meanwhile continuing to make the current payments.

• • • •

RECOMMENDATION:

It is, therefore, respectfully recommended that imposition of sentence be suspended, that defendant be placed on probation for a term of five years, on the condition that she spend the first 30 days in custody of the Sheriff of San Diego County, that she forthwith surrender her California operator's license to the Court for forwarding to the Department of Motor Vehicles for revocation, and that she not drive or operate a motor vehicle without first being duly licensed by the Department of Motor Vehicles of this state; that she abstain from the use of intoxicating beverages, and that she not frequent places where they are the main item of sale, including premises owned or operated by her husband; and that immediately upon her release from custody she resume psychiatric treatment and continue in such treatment unless released by the therapist or this Court.

Respectfully submitted,

CHARLES T. G. ROGERS
Chief Probation Officer

By: /s/ MARY GELL
Mary Gell
Assistant Probation Officer

Approved MARY GRAHAM
Mary Graham
Supervisor

I have read and considered the foregoing report of the Probation Officer.

/s/ CONYERS
Judge of the Superior Court

MG:rsi

Memorandum Opinion of the District Court Excluding DERs Filed January 31, 1983

FILED—Jan 31 1983—James F. Davey, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1258

ANNE ELISABETH KOLLER, *et al.*,
Plaintiffs,

v.

RICHARDSON-MERRELL, INC.,
Defendant.

MEMORANDUM OPINION

This matter is before the Court on defendant's motion to exclude drug experience reports (DERs) maintained by the Food and Drug Administration (FDA). The FDA requires all drug manufacturers to keep records of adverse drug reactions that are reported by consumers. These manufacturers must file periodically with the FDA any DERs, which include any materials concerning an incident of an alleged adverse drug

reaction, that have been collected. Defendant seeks to bar plaintiffs from introducing the approximately five hundred DERs referring to Bendectin to prove either that defendant had notice that Bendectin causes limb defects or that Bendectin causes limb defects. Hence, the Court must determine whether the DERs can be introduced to show notice as an element of punitive damages and to support causation by linking Bendectin to limb defects. With certain restrictions to protect against prejudice to defendant and to limit collateral issues, plaintiffs will be permitted to employ the DERs on the issues of notice* and causation.

Defendant's initial argument to block the use of the DERs is that they are inadmissible hearsay. Although defendant's argument merits serious consideration, the Court finds that a series of exceptions to the hearsay rule remove the DERs from the realm of hearsay. At the outset, it is uncontested that the DERs are composed largely of out-of-court statements of individuals to physicians concerning a variety of problems that have been experienced after the ingestion of Bendectin. The physicians compile the comments and then send this information to defendant. Defendant is legally obligated to retain these reports and periodically submit them to the FDA. Thus, because the DERs are out-of-court statements offered for the truth of the matter asserted,** they constitute hearsay unless hearsay exceptions are applicable.

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* If the Court grants defendant's motion for summary judgment on the issue of punitive damages, then the issue of notice will no longer be relevant.

** At various points in this litigation, both plaintiffs and defendant have urged the Court to distinguish between the issues of notice and causation in the resolution of various legal problems. Technically, using the DERs on the issue of notice would not constitute offering an out-of-court statement for the truth of the matter asserted. After further reflection, however, it appears that the unusual nature of the allegations in the instant case makes distinguishing between the issues of notice and causation for evidentiary rulings an artificial exercise. In the typical case, plaintiff cites prior tortious incidents and suggests that the occurrence of these incidents demonstrates that defendant was aware of the risk and declined to take obvious precautions to prevent future accidents. For example, the fact that an auto manufacturer

The DERs can be characterized as presenting an evidentiary problem of either double or quadruple hearsay. Because two of the steps in the analysis are uncontested,* the DERs will be viewed as creating a classic problem of double hearsay. Defendant first argues that the physician's recording of a patient's experience with Bendectin cannot qualify as a business record because the recording of potential causes of birth defects is not

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was aware of accidents in which gas tanks exploded during collisions and failed to take inexpensive precautions could support an award of punitive damages. In that case, however, no one claimed that it was impossible for the gas tank to explode regardless of the severity of the collision. As a result, the considerations in a determination of punitive damages were the seriousness of the risk, defendant's awareness of the risk, and what remedies could the defendant have employed. In contrast, the issue of notice in the instant case as perceived by plaintiffs would appear to assume away the issue of causation; *i.e.*, a showing of notice initially requires a demonstration that available information supports a finding that Bendectin causes limb defects. Yet, defendant has consistently maintained that Bendectin is not a teratogen and has never caused any limb defects. Hence, until plaintiffs make a sufficient showing on the threshold issue of causation, defendant can undeniably maintain that it had no notice or knowledge of Bendectin's teratogenicity. Therefore, this discussion has demonstrated that the use of the DERs to show notice implicitly requires reliance on the truth of the out-of-court statements upon which the DERs are based.

* After the physician records the information conveyed to him, he sends the materials to defendant who eventually transfers the reports to the FDA. It is not challenged that the DERs are one type of business records maintained by defendant pursuant to statutory mandate. Once these records are transferred to the FDA, they become public records. Whether viewed as business or public records, the DERs qualify as hearsay exceptions with respect to their treatment by defendant and the FDA. A double hearsay problem concerning the physician-recorder and the patient-reporter remains.

A more likely analytical approach to the DERs in the possession of the defendant and the FDA is to analogize to a showing of a chain of custody in a criminal case. The DERs are complete once defendant has collected all the materials submitted regarding an incident of an alleged adverse drug reaction. As a result, the legal problem is not truly one of hearsay, but rather a need to be assured that the DERs have not been altered once they are completed. The statutory obligation to maintain the DERs and to transfer them to the FDA where the DERs become public records readily satisfies this concern for the integrity of the DERs.

a regular business activity. Initially, the Court rejects defendant's unarticulated assumption that birth defects are so rare to physicians that reports about such defects are not routine matters. In fact, that assumption contradicts defendant's recurring argument that birth defects naturally occur relatively often. Moreover, the Court does not accept defendant's myopic view that focuses only on the treatment of birth defects. Physicians routinely record a patient's medical history, including the ingestion of various drugs, after a medical problem has resulted. Thus, the hearsay exception for business records does apply to the physician's recording of his patient's comments after the patient's child has been born with birth defects.

While the physician-recorder qualifies for a hearsay exception, the DERs still cannot be admitted unless the patient-reporter also qualifies for a hearsay exception. Defendant contends that the patient's statements cannot be construed as statements of past physical condition to obtain medical diagnosis or treatment because the statements are nothing more than accusations of fault after birth defects have occurred. Yet, the patients who initiated the DERs that involve Bendectin generally are no different than individuals who fear they have been injured by other products. The overriding objective of most of these individuals in consulting their physicians is to obtain medical treatment or diagnosis. These individuals have strong incentives to discover the cause of the birth defects so that they will not suffer birth defects in the future (*e.g.*, genetic causes) or so that others will not suffer similar consequences. Accordingly, the DERs are not inadmissible hearsay by virtue of the combined application of the hearsay exceptions for business records and statements of past physical condition for the purposes of medical treatment or diagnosis.

Defendant's concern for the accusatory motivation for some of the DERs cannot be ignored. There are less drastic measures than exclusion of the DERs, however, that can protect against defendant's concern. At a minimum, explicit accusatory language, *e.g.*, "Bendectin caused this birth defect," will not be

admissible. The DERs merely may reflect that Bendectin was taken and that birth defects were later suffered. In addition, the Court concludes that the danger of self-serving comments increases as the time between the observation of the birth defects and the filing of the DERs lengthens. Consequently, plaintiffs may select representative DERs that were initiated no greater than one year after the birth of the child that suffered the birth defects.*

Defendant's remaining argument to exclude the DERs is that they are not relevant to the issues of notice and causation. Defendant maintains that the DERs are not probative because approximately two percent of all births naturally involve birth defects. In addition, defendant complains that the number of DERs has been inflated because the plaintiff's bar has been encouraging the public to file DERs concerning Bendectin. Neither of defendant's contentions stand for the proposition that the DERs are not relevant. Defendant's reliance on a natural birth defect rate and a natural rate of limb defects has already been rejected as a basis for summary judgment and the reasoning previously expressed applies to this evidentiary issue as well. *See* Memorandum Opinion (D.D.C. Jan. 24, 1983). As for the allegedly inflated number of DERs, it is questionable

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* Other restrictions relating to different concerns such as the avoidance of collateral issues will be discussed after defendant's challenge on the ground of relevance is considered.

The one year limitation should not be construed as a conclusion that all or most DERs filed over a year after birth are accusatory or self-serving. Rather, this limitation is designed to protect against defendant's concern, while assuring plaintiffs of an adequate set of DERs to select representative samples. Defendant's concern with the timeliness of the patient's reporting also should be alleviated by the one year limitation. It is true that as time passes, a patient's memory is likely to become less clear with respect to when Bendectin was taken and any other complications that may have caused the birth defects (although some of the DERs may contain prescription records and other details of the pregnancy). The Court rejects defendant's suggestion that DERs are so untimely, since they necessarily cannot be filed until after birth, that they should not qualify for a hearsay exception. The fact that the hearsay exception for statements of physical condition has been extended to past physician condition reflects that the exception tolerates some time lapse.

whether defendant can seriously dispute that the number of birth defects are significantly underreported. Hence, any inflation by the plaintiff's bar would appear to be offset by the propensity to underreport birth defects to defendant and the FDA. Lastly, defendant's concession that the DERs are a "red flag" and an "early warning device" for birth defects undercuts any contention that the DERs have no probative value. Whether defendant would be entitled to a directed verdict or a jury instruction if the only evidence of causation is the DERs is a separate issue to which the parties may devote their future attention.

Although defendant's arguments do not make the DERs irrelevant, they do raise a valid concern that no one should be permitted to suggest that the DERs are a random sample or are based upon any scientific methodology. To avoid confusing the jury and seriously distorting the nature of the DERs, plaintiffs will be barred from suggesting that any incidence rate of limb defects can be derived from the DERs. At most, plaintiffs will be permitted to indicate either the number of DERs involving Bendectin that concern birth defects or the number of DERs involving Bendectin that concern limb defects (depending on whether the permitted scope of the evidence is all birth defects or only limb defects).

The danger of collateral issues necessitates a final limitation on plaintiffs' use of the DERs. Plaintiffs will be permitted to discuss five DERs that they may select. This limitation to five representative samples will prevent the parties from digressing into a myriad of collateral issues concerning over five hundred DERs.

In sum, the DERs are admissible on the issues of notice and causation. Plaintiffs will be permitted to refer in detail to five representative samples which they may select from among those DERs filed less than one year after birth. Any accusatory language in the DERs also will be stricken. In addition, plaintiffs may elicit testimony concerning the number of DERs, but may not suggest an incidence rate for birth defects from the DERs or infer such a rate by citing the number of

DERs and the number of those DERs that refer to limb defects.

An Order consistent with this Memorandum Opinion will be entered this date.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

DATE: January 28, 1983

Order of the District Court Excluding DERs
Filed January 31, 1983

FILED—Jan 31 1983—James F. Davey, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1258

ANNE ELISABETH KOLLER, *et al.*,
Plaintiffs,

v.

RICHARDSON-MERRELL, INC.,
Defendant.

ORDER

Upon consideration of defendant's motion to exclude the drug experience reports (DERs) collected by the Food and Drug Administration, plaintiffs' opposition, the accompanying memoranda of law, the argument of counsel, and the entire record herein, it is this 28th day of January, 1983,

ORDERED that defendant's motion to exclude the DERs be, and hereby is, denied; and it is further

ORDERED that the following limitations shall be imposed on plaintiffs' use of the DERs:

1) Plaintiffs may elicit testimony concerning only five representative samples from among those DERs that were initiated less than one year after birth;

2) Plaintiffs may not refer to any language in the DERs containing accusations or allegations of fault involving defendant or the drug Bendectin;

3) Plaintiffs may not utilize the DERs to suggest any incidence rate of birth defects in general or limb defects in particular;

and it is further

ORDERED that plaintiffs shall notify defendant of the five DERs they have selected not later than five (5) days prior to the commencement of trial.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

Excerpts from United States District Court for the District of Columbia Hearing Transcript of January 31, 1983

[9] MR. BRANTON: * * * *

I presume the trial is going to commence very shortly, although a specific date has not been set.

THE COURT: Well, a specific date has not been set and you know why. It has not been set because I haven't been able to set it. But I have told you that every day we come in here, if I can proceed to pretrial, I shall, and as soon as the pretrial is over, we begin trial. * * * *

[47] * * * * MR. BUTLER: We offered then and we offer now to refer the matter to the prosecutor here in Washington or to the prosecutor in California or the prosecutor in Florida, and to allow the FBI to take jurisdiction, because if there is a fraud on this Court, that's where it belongs. I do not believe it is the duty of this Court to give a badge to Mr. Walsh to become our prosecutor or our persecutor, and I think that it would be—

THE COURT: You are not suggesting that the Court **[48]** has, are you?

MR. BUTLER: I beg your pardon, Your Honor?

THE COURT: I said, you are not suggesting that the Court has, are you?

MR. BUTLER: Your Honor, you gave them an awful good opportunity on December 23rd when they communicated with the Court and nobody notified us of the communication to the Court and allowed them to start investigating our particular employee from the 23rd, the 24th and the 26th and thereafter.

THE COURT: Well, let me just say to you, Mr. Butler, that you are very much mistaken. The defendants did not communicate with me. I had nothing to do with anything that the defendants may have done prior to Christmas. I did learn that they talked to my clerk prior to Christmas, but they certainly did not talk to me.

I came to work as assigned on December 27th and received a letter from Mr. Lewis on that date. I don't know where you got your information from that this Court did anything with respect to anything that the defendants might have said or done prior to December 27th, and I did nothing with respect to it on December 27th save read the letter that they sent me. And on December 29th I received a letter from you, and from December 29th on, it has been one missive after another.

This Court took no action; no one requested this **[49]** Court to take action until sometimes the week of January 3rd when I was asked for an immediate deposition.

So, I don't know where you got that information from.

MR. BUTLER: I chose my words carefully. I said there was a communication with the Court, and I assume that a communication—

THE COURT: I am the Court.

MR. BUTLER: I think your functionaries are part of your court, Your Honor.

THE COURT: No, sir. I am the Court. I am the Court. My functionaries are not the Court and no one spoke to me prior to Christmas. * * * *

[59] * * * * MR. BUTLER: Your Honor, I really think that you ought to order the cessation of payments to that woman.

THE COURT: Well, that may be your view, and if you wish to, you may file an appropriate motion, because, as I said, I still haven't read that part of the deposition testimony where you say Mr. Schuck says that. But you certainly may file the appropriate motion.

MR. BUTLER: Your Honor, with respect to where we are going from this point, I have certain definite views. I would like to be heard on them. I don't know whether this is the time. * * * *

[61] * * * * MR. BUTLER: We would like to try to start in about three weeks, Your Honor.

THE COURT: No way, no way.

MR. BUTLER: I think that there are so many matters that—

THE COURT: I agree with you. There may be a lot of matters, but we will have to find a way to resolve those matters because I can't wait three weeks to go to trial. I have already lost a month. Well, maybe not a month. This would be the third week of trial but for these matters. Today would commence the third week of trial but for these matters.

So, that is something I will consider, but I doubt seriously if I can push it back three additional weeks. So, you start working towards moving it up, because I can't put **[62]** it off three additional weeks. * * * *

* * * * MR. WALSH: May it please the Court. I just have a few brief things to say.

First, I would like to make clear as to Mr. Lewis's telephone conversation prior to Christmas that all we were trying to find was the mechanics, whether the Court would be available for a conference with Mr. Eaton and us or whether I should—I think I was in Oklahoma City, as I remember, trying to decide what do I do. I've got telephone messages about Ms. Janowski. I don't want to—I was debating, do I have to talk with Mr. Eaton, bring it before Your Honor or can we find her and get a lawyer for her, because I didn't want my team exposed to her in a position that could cause some abortion in this case.

So, that's the only reason for his exploration.

THE COURT: Let me just ask Mr. Lewis something. Mr. Lewis, I would just ask you here on the record, based **[63]** upon that telephone call, were you given any direction by this Court?

MR. LEWIS: No direction whatsoever, Your Honor. I called to ask if the Court would be available for Mr. Eaton and myself prior to Christmas and was told that the Court would be in recess until the Monday following. No directions were given.

THE COURT: Thank you. Because as I said, I know I was on recess until I had to come in on Monday the 27th.

MR. BUTLER: Your Honor, could I inquire as to whether the substance of the problem was communicated to the clerk?

THE COURT: To my clerk? I have no idea what was communicated to my clerk.

MR. BUTLER: Could Mr. Lewis put it on the record, Your Honor?

THE COURT: As I told you a few minutes ago, it doesn't make any difference. If anybody chooses to say something to my clerk, that is their hard luck, because I have made it clear to him and I would think that members of the bar must know that a clerk doesn't make decisions, can't make decisions, can't offer direction.

MR. WALSH: I think Mr. Lewis recited it in his letter which went to Mr. Butler on Monday, Your Honor, as soon as we could.

[64] As I remember it, Your Honor was originally going to take the week after Christmas off.

THE COURT: Yes, I was, because I had originally been scheduled to work—the recess assignment list came out and I was scheduled to work on December 24th. It later occurred to the administrative office of this court that since Christmas was on a Saturday, then the 24th, that Friday, would be a government holiday. On holidays, a judge does not have to be present in the Court. You just have to be available, and they are different calendars. So, the 24th went to Judge Jackson.

The recess assignment calendar, however, came to me on Monday the 27th. So, I had to physically be present in the courthouse all day Monday the 27th. That was the only day in the entire holiday that I had to be in the courthouse.

MR. WALSH: And Mr. Butler very well knows that as soon as the weekend was over, he had a letter from Mr. Lewis summarizing the events of that period. • • • •

Defendant's Memorandum in Support of Motion for Imposition of Sanctions on Plaintiffs' Counsel Filed February 7, 1983

United States District Court
District of Columbia

Civil Division

Received—FEB 7 1983—U.S. District Court

(Caption Omitted in Printing)

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR IMPOSITION OF SANCTIONS ON PLAINTIFFS' COUNSEL, AND TO GIVE NOTICE OF DEFENDANT'S INTENTION TO MOVE TO STRIKE JURY DEMAND AND TO DISMISS COMPLAINT

• • • •

Nevertheless, the publication of information conveyed by Mr. Butler to the *Washington Post* will inevitably create unfair prejudice among some of the jury panel. Defendant has no recourse except to seek the dismissal of this action without prejudice to its reinstatement at some other time and upon a showing to this Court of good cause.

• • • •

(Certificate of Service Omitted in Printing)

Affidavit of Ogden N. Lewis In Support of Motion For An Order Imposing Sanctions on Plaintiffs' Counsel Filed February 7, 1983

United States District Court for the District of Columbia

(Caption Omitted in Printing)

AFFIDAVIT OF OGDEN N. LEWIS

Ogden N. Lewis, being duly sworn, deposes and says:

1.

• • • • I make this affidavit in support of defendant's motion for an order precluding the firm of Butler, Jefferson, Dan & Allis from appearing before this Court in this case.

2. Submitted herewith as Exhibit A is a set of 14 alleged Drug Experience Reports received by defendant on February 3, 1983, sent by James G. Butler, Esq., counsel for plaintiffs. I am informed by Mr. Alfred E. Schretter, resident counsel for defendant, that copies of Exhibit A have been given by Mr. Butler to *The Washington Post* and to the National Broadcasting Company and that defendant has received telephone inquiries from both. Mr. Schretter also informed me that Mr.

Butler sent copies of Exhibit A to the Commissioner of the Food and Drug Administration.

3. Attached hereto as Exhibit B is a copy of an article by Morton Mintz which appeared on page A3 of *The Washington Post* on February 7, 1983.

/s/ OGDEN N. LEWIS
Ogden N. Lewis

Sworn to before me this
7th day of February 1983.

/s/ LINDA D. HURLEY
Notary Public
My commission expires Aug. 14, 1984

(Certificate of Service Omitted in Printing)

Excerpt from Exhibit A to Affidavit of Ogden N. Lewis
Dated February 7, 1983

(3" x 5" Photograph Omitted)

Marco Cordova

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova Age 25 (at time of delivery)

Hospital Case Number 1-38346-9

Hospital (including address) Good Samaritan Hospital of Santa Clara Valley, 2425 Samaritan Drive, San Jose, California

Infant's Name(s) Marco Cordova
(If multiple birth, name of each)

Infant's Hospital Case Number(s) 1-38346-9
(If multiple birth, number of each)

Hospital (if in addition to above—including address) No

Hospital Case Number(s)
(If hospital in addition to above)

Physician Attending Delivery (if different from below) Dr. (?) Staff physician
Name (Printed)

Address

(City, State, and Zip)

Place of Delivery (including address) if Other Than Shown Above: Same as above

Physician Submitting This Report: N/A

(Signature)

Name (Printed)

Address

(City, State and Zip)

(Date of This Report)

RETURN TO:
MERRELL DOW PHARMACEUTICALS INC.
Subsidiary of the Dow Chemical Company
Cincinnati, Ohio 45215

FS FEB 02 1983

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Check 1 box in each of the following 4 columns. Attach available pediatric, pathologic, radiologic, or any consulting physicians' reports. If multiple birth, provide information on pages 1, 2, 3, & 4 of a separate copy of this form for each birth.

Single Birth XX Multiple Birth ☐ Number____ If multiple birth, name (or hospital number) of individual birth for these pages 1, 2, 3, & 4: _____	Living XX Stillbirth ☐ Neonatal Death I. ⟨ 1 Day ☐ II. 1-6 Days ☐ III. 7-28 Days ☐ Date of death: _____	Term (2500 g.* or more) XX Premature (1000-2499 g.*) ☐ Immature (500-999 g.*) ☐ Spontaneous Abortion (⟨ 500 g.*) ☐ Induced Abortion ☐	Birth Defects No ☐ Yes XX

Date and Time of Birth (or Delivery) 4/10/74

Total Length at Birth 42 cm.†

Crown-Rump Length at Birth / cm.†

Birth Weight 3004 g.*

Sex M Apgar Score ___/___ (at 1 min.)
___/___ (at 5 min.)

Perinatal † Death History (if checked)

Cause of perinatal death (if known) N/A

Spontaneous Abortion History (if checked)

Cause of spontaneous abortion (if known) and describe abortus if abnormal (*e.g.*, hydatidiform mole) N/A

Birth Defect History (if checked)

Delivering physician's clinical description of birth defect(s) At Birth (including age when first observed) Phocomelia: Upper and Lower extremities

(continued on next page)

*1 pound = 454 g.; 1 ounce = 28 g.
†1 inch = 2.54 cm.

± Perinatal death includes stillbirths and neonatal deaths

2500 g. = 5 pounds, 8 ounces
1000 g. = 2 pounds, 3½ ounces
499 g. = 1 pound, 2 ounces

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Birth Defect History (if checked)

Relationship or potential relationship, if any, of birth defect(s) to process of birth and explain (*e.g.*, long labor, difficult anesthesia, dystocia, anoxia, etc.).
None

Pediatrician's clinical description of birth defect(s)* (including age when first observed) Phocomelia: The clavicle and scapula appear intact but only 2 small bones are seen lateral to the R.F. shoulder. On the left side, no bony structures are apparent lateral to the shoulder.

Stanford University School of Med. Dept. of Radiology

The acetabulum is poorly formed and there is significant diastasis pubis. There is one long bone in each leg (probably femur).

Three apparent metacarpal bones are seen in each foot as well as several phalanges.

Pediatrician's name* N. Dunnick, Bruce Parker

Summary of radiology report (with dates)* 6/6/74

Summary of ophthalmology report (with dates)* None

Summary of neurology report (with dates)* _____
None

Summary of surgery report (with dates)* _____
None

Summary of pathology report (with dates)* _____
None

Summary of chromosome analysis report (with dates)*
N/A

(continued on next page)

*Attach available physician's reports and their names and addresses.

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Birth Defect History (if checked)

Summary of laboratory reports (with dates)* _____
None

Perinatal† complications (with dates or age) _____
None

Perinatal illnesses, infections, injuries, etc. (with dates or age) _____
None

History of all medication to child during perinatal period

Drug	Reason Used	Approx. Date(s) (inclusive)
	N/A	

Other pertinent perinatal history No

* Attach copies of available reports (routine blood, urine, chemistry, and special tests)

† Perinatal includes up to 27 days, 23 hours, and 59 minutes of life.

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Obstetric History

Details of delivery (if induced, give reason and method), anesthesia, other medication, episiotomy, abnormalities (including duration) of labor, birth (natural, breech, forceps, cesarean), and postpartum conditions
Uneventful, no forceps, spontaneous

If multiple pregnancy, specify if monovular or polyovular and explain
N/A

Comment on placenta and cord (placenta weight, umbilical vessels, pathology, etc.) 575 gms. and ~17 cms in diameter; Cord inserts slightly off center, but not at margin. Three prominent vessels, one congested with blood. No atypical features—Term Placenta.

If induced or therapeutic abortion, specify date, reason (*e.g.*, ectopic pregnancy), and describe abortus if abnormal (*e.g.*, hydatidiform mole)
N/A

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Antepartum History

Start of last menstrual period (date)	6-10-73	Estimated date of conception	6-(24-27)-73 or 7-18-73
Date of birth (or delivery)	4-10-74	Gestation (weeks after LMP)	43
Gestation (weeks after conception	41 38	Fetal age (weeks after conception)	41 38

Fetal position for last trimester Not stated

Maternal infections (including venereal) during this pregnancy (viral or bacterial with inclusion of clinical diagnosis, laboratory tests and results, dates, duration of infection and treatment, degree of fever, and duration of fever)
None

Other medical history during this pregnancy (illnesses, diabetes or other endocrine disorders, surgery, mental health—with dates) Ongoing rheumatoid arthritis

Routine blood, urine, and chemistry tests during this pregnancy? _____ If so, specify with dates and provide results (and date obtained) if abnormal*

N/A

Hemoglobinopathies (*e.g.*, sickle cell anemia)?

No

*Attach copy of reports if available

(continued on next page)

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Antepartum History (cont.)

Blood type and blood antigen/antibody tests *during* or *before* this pregnancy (*e.g.*, Rh factor, rubella, Australian, cytomegalovirus, herpes, etc.) No If so, give dates and results

Rh compatability with infant's father Compatible (+)

Special blood or urine hormone assay tests (*e.g.*, estriol) during this pregnancy? No If so, specify with results and dates

History of nausea and vomiting with severity, dates, and treatment

Nausea (None or Severity)	Nausea (Dates)	Vomiting (None or Severity)
Severe	8-1 to 8-30	Severe
Vomiting (Dates)	**Type of Treatment**	**Dates of Treatment**
once	Bendectin	8-1 to 8-30

History of inability or reduced ability to eat or retain food eaten? No If so, describe severity with dates and treatment with dates

---

History of alcoholic beverage consumption? No If so, type and amount consumed per day or week *during pregnancy* (each month or trimester of pregnancy if variable)

N/A

---

and before pregnancy N/A

(continued on next page)

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Antepartum History (cont.)

History of tobacco (or other) smoking? No If so, specify type and amount smoked per day or week *during pregnancy* (each month or trimester of pregnancy if variable)

and before pregnancy No

Vaginal bleeding during this pregnancy? No If so, state dates, amount or degree, cause, if known (*e.g.*, placental placement), and treatment

Attempted abortion by patient [date(s)]? No

If so, treatment N/A

Threatened abortion [date(s)]? No

If so, treatment N/A

Other complications of this pregnancy? No If so, describe with dates

History of all medication during this pregnancy [include all oral, parenteral (including vaccines), topical, vaccination, over-the-counter, investigational, and prescription drugs, including vitamins and hormones]

Drug	Reason Used	Approx. Date(s) (inclusive)
Aspirin	Arthritis	8-12 (5 grain tabs) daily thru 10/7
Bendectin	Nausea	8-1-73 thru 8-30-73
Prednisone	Arthritis	5 mgs daily thru 10/73

Amniocentesis, sonarography, etc.? No If so, identify with dates _____

(continued on next page)

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Antepartum History (cont.)

Exposure to radiation (including dental) during pregnancy (dose and date) No

Allergic reactions? No

If so, dates and treatment _____

Stress (emotional—deaths in family, family problems, etc., and dates) No

Toxemia of pregnancy? No

If so, treatment and dates _____

Weight change during this pregnancy 28 lb. (or ____ kg.)

Did an abnormal weight change occur during this pregnancy? No

If so, reason and treatment with dates _____

Anemia (diagnosis, laboratory result, dates) No

If so, treatment and dates N/A

Dental care (including anesthesia, operative) during this pregnancy? _____

If so, describe with dates _____

No

Exposure (with dates) to household chemicals or other potentially toxic substances in the home (cosmetic or hair preparations, *e.g.*, selenium), in the neighborhood (*e.g.*, insecticides, weed control or plant sprays), and at work

No

Occupation (if other than housewife) _____

Exposure (with dates) to pets (dogs, cats, hamsters, etc.) during pregnancy (with type of exposure, *e.g.*, pet in house, pet slept in bed with mother, etc.)

No

(continued on next page)

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Antepartum History (cont.)

Exposure (with dates and with whom, *e.g.*, other children in family) to communicable diseases (*e.g.*, rubella, varicella, etc.)

No

Travel (place, from-to, type of transportation, and dates) No

Seat belts (car, plane, type, dates) _____

No

Other history (including dates) of accidents or mechanical trauma (with inclusion of sports) during pregnancy

No

Pre-conceptual History

Was this a planned pregnancy? ☒ NO ☐ YES

Was a fertility drug used? ☒ NO ☐ YES If yes, specify drug(s), doses, dates of administration, and name and address of prescribing physician _____

Was artificial insemination involved? No

If so, amplify (*e.g.*, A.I.D., hetarologous or donor; A.I.H., homologous or husband; other; etc.) _____

Contraceptive (specify type, name, and date last used)
Norinvl up till January prior to pregnancy

Was oral contraceptive ever used? YES

If so, and different from above, specify name and date last used
Norinvl

Pre-conceptual body weight 128 lb. (or ____ kg.)

Body height 64 in. (or ____ cm.)

(continued on next page)

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Maternal History

Marital status ☒ Married ☐ Single ☐ Other

Race ☒ Caucasian ☐ Negro ☐ Oriental
☐ Am. Indian ☐ Spanish-Am.
☐ Other _____

Nationality (or nationalities) of family origin
(Example, ½ German, ¼ Irish, ¼ unknown)
¼ Italian; ¼ Austrian; ¼ Unknown

Age of menarche 14

Menstrual history prior to this pregnancy
Uneventful 28 days w/6 day flow.

Medical history prior to this pregnancy [infections (including veneral), illnesses, diabetes or other endocrine disorders, surgery, accidents, mental health—with dates] Rheumatoid Arthritis since 1977

History of all medication prior to this pregnancy (include all oral, parenteral, topical, over-the-counter, investigational, and prescription drugs, including vitamins and hormones) giving special attention to medication of the 2-year period prior to this pregnancy.

Drug	Reason Used	Approx. Date(s) (inclusive)
Aspirin		1972 to 10-73
Prednisone	Arthritis	1972 to 10-73

Radiation history prior to this pregnancy (including dental and other, as well as estimated exposure and date of diagnostic and therapeutic radiation)

Dental and arthritis diagnosis

(continued on next page)

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Maternal History (cont.)

History of previous pregnancies of mother. If other than normal term live birth, add comment (*e.g.*, reason, cause, etc., if possible, and provide summary description of birth defects if checked "yes")

PREGNANCY SEQUENCE	DATE OF DELIVERY	WEEKS OF GESTATION	(CHECK 1) SINGLE BIRTH	(CHECK 1) MULTIPLE BIRTH No.	LIVE BIRTH	STILL BIRTH	NEONATAL DEATH
1st	7/2/67	38	XX		XX		
COMMENT:							
2nd							
COMMENT:							
3rd							
COMMENT:							

(CHECK 1)		(CHECK 1)					(CHECK 1)	
SEX (ENTER NO.)		TERM	PRE-MATURE	IMMATURE	ABORTION (<500 G.)		BIRTH DEFECTS	
MALE	FEMALE	2500 G. OR MORE	1000 TO 2499 G.	500 TO 999 G.	INDUCED	SPONTAN.	NO	YES
XX		XX						XX
COMMENT:								
2nd								
COMMENT:								
3rd								
COMMENT:								

Complications (including bleeding episodes) of any of the above pregnancies or births (identify with above)

No

Maternal Family History of Diabetes

If family history of diabetes, give relationship of person(s) to mother

No

Maternal Genetic Counseling

If history of genetic counseling and/or chromosome analyses, provide summary*

No

* Attach copy of available report(s).

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Maternal Genetic History (if infant has birth defect)

Summary of family history of mother (her relatives such as brothers, sisters, parents, grandparents, uncles, aunts, their children, etc.) with regard to congenital birth defects, giving description, sex of person, relationship of person to the infant who is primary subject of this report

None

Paternal History

Father's Name Joseph R. Cordova

Age at time of delivery 37

Marital status ☒ Husband of mother ☐ Other

Race ☐ Caucasian ☐ Negro ☐ Oriental ☐ Am. Indian ☐ Spanish-Am. ☐ Other

Nationality (or nationalities) of family origin (Example, ½ German, ¼ Irish, ¼ unknown)

½ Italian—½ Polish

Comment on father's fertility status (sperm/semen quality, etc.)

Normal

Comment on Rh factor and compatability

(+) Compatible

Stress (emotional—job-related, deaths, family problems, etc. and dates) during wife's pregnancy or during 3 months prior to conception date.

No

Travel (place, from-to type of transportation, and dates, if different from that given in maternal history) during wife's pregnancy or during 3 months prior to conception date

No

Occupation Horse shoer

(continued on next page)

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Paternal History (Cont.)

Exposure (with dates and with whom if different from that given in maternal history) to communicable disease (*e.g.*, rubella, etc.) during wife's pregnancy or during 3 months prior to conception date

No

Exposure (with dates) to chemicals or other potentially toxic substances in the home, in the neighborhood, and at work during wife's pregnancy or during 3 months prior to conception date

No

Radiation history prior to the conception date of this pregnancy (including dental and other, as well as estimated exposure and date of diagnostic and therapeutic radiation)

No

Medical history prior to the conception date of this pregnancy [testicular problems, infections (including venereal), illnesses, diabetes or other endocrine disorders, surgery, accidents, mental health—with dates]

No

History of all medication prior to conception date of this pregnancy (include all oral, parenteral, topical, over-the-counter, investigational and prescription drugs, including vitamins and hormones) giving special attention to medication of the 2-year period prior to this pregnancy.

Drug	Reason Used	Approx. Date(s) inclusive
N/A		

(continued on next page)

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Paternal History (cont.)

Reproductive history of father related to known resulting pregnancies (those different from, or in addition to, those given in maternal history). If other than term live birth, add comment (*e.g.*, reason, cause, etc. if possible, and provide summary description of birth defects if checked "yes").

PREGNANCY SEQUENCE	DATE OF DELIVERY	WEEKS OF GESTATION	(CHECK 1) SINGLE BIRTH	(CHECK 1) MULTIPLE BIRTH No.	(CHECK 1) LIVE BIRTH	(CHECK 1) STILL BIRTH	(CHECK 1) NEONATAL DEATH
1st	3/2/60	38	XX		XX		
COMMENT:							
2nd							
COMMENT:							
3rd							
COMMENT:							

(CHECK 1)		(CHECK 1)					(CHECK 1)	
SEX (ENTER NO.)		TERM	PRE-MATURE	IMMATURE	ABORTION (<500 G.)		BIRTH DEFECTS	
MALE	FEMALE	2500 G. OR MORE	1000 TO 2499 G.	500 TO 999 G.	INDUCED	SPONTAN.	NO	YES
	XX	XX					XX	
COMMENT:								
2nd								
COMMENT:								
3rd								
COMMENT:								

Complications (including bleeding episodes) of any of the above pregnancies or births (identify with above)

None

Paternal Family History of Diabetes

If family history of diabetes, give relationship of person(s) to father

No

(continued on next page)

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name: Victoria Cordova

Paternal Genetic Counseling

If history of genetic counseling and/or chromosome analyses, provide summary*

No

Paternal Genetic History (if infant has birth defect)

Specify, if any, known consanguinity of father and mother (cousins, second cousins, etc.)

No

Summary of family history of father (his relatives such as brothers, sisters, parents, grandparents, uncles, aunts, their children, etc.) with regard to congenital birth defects, giving description, sex of person, relationship of person to the infant who is primary subject of this report

None

*Attach copy of available report(s).

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BEST AVAILABLE COPY

Exhibit B to Affidavit of Ogden N. Lewis
Dated February 7, 1983

THE WASHINGTON POST Monday, February 7, 1983 A3

Lawsuits Allege Birth Defects in Children Whose Mothers Took Bendectin

By Morton Mintz
Washington Post Staff Writer

Lawsuits filed on behalf of seven children and their parents allege that the children were born without arms or legs or with other grave limb deformities because their mothers took Bendectin, the only government-approved drug for the "morning sickness" of early pregnancy.

Lawyers have been retained on behalf of seven more similarly deformed children and their parents.

The 14 cases of severe malformations open a new chapter in a continuing controversy about whether Bendectin taken in the first several weeks after conception has a cause-effect link to any of several birth defects, ranging from cleft palates to potentially fatal hernias.

The Food and Drug Administration is examining the cases but said late last week that no evidence to date establishes causal connections. The FDA's most relentless critic, the Public Citizen Health Research Group (HRG), and the manufacturer, Merrell Dow Pharmaceuticals Inc., took the same position.

"Because Bendectin is widely used in pregnancy [about 20 percent of pregnant women have used it in the past], many abnormalities will occur in babies exposed to the drug, whether or not the drug caused them," the FDA said.

The FDA also renewed advice that Bendectin "should be used only when more conservative treatment of nausea and vomiting has failed."

In Cincinnati, a Merrell Dow spokesman said that each of the 14 cases "must be looked at individually. There are variations from case to case, and no two are alike. Such things as the type of defect, when Bendectin was taken, other drugs that may have been ingested, and genetic factors are among those that must be examined .... We still contend that the drug is the most tested drug for pregnant women, and the accumulated human studies continue to show a lack of association between use of Bendectin and an increase in birth defects."

Similarly, the FDA said that "two dozen studies involving exposures to Bendectin during pregnancy have not shown a link between [it] and limb-reduction defects."

The chief plaintiffs' lawyer, James G. Butler of Los Angeles, pointed out that the human studies have been faulted by the FDA's own medical officers. He urged FDA Commissioner Arthur Hull Hayes Jr. to halt sales of Bendectin.

Butler also cited a two-month-old federally funded study indicating that women in early pregnancy who swallowed the original Bendectin tablets may have quadrupled the risk of pyloric stenosis, a birth defect of the stomach that restricts an infant's ability to eat.

Butler is a long-time legal adversary of the company, having won a $2.75 million jury award against it in 1972 for a legless child whose mother had taken thalidomide, a sedative/tranquilizer that caused thousands of such severe injuries worldwide in the 1960s. Thalidomide was "tested" but not sold here.

Over the last two years, Butler said in an interview, lawyers around the country who knew of his thalidomide victory referred most of the 14 cases. He said he intends to seek compensatory and punitive damages for all of the children.

In addition, the U.S. District Court in Cincinnati is conducting pretrial proceedings in about 150 Bendectin cases in which various diverse birth defects are alleged.

Last week, the parents of the 14 children—nine boys and five girls ranging in age from 3 to 20—released photos showing the deformities and statements about their cases to the FDA and to The Washington Post. At the time, Butler was preparing for trial of one of the lawsuits, which may begin this week in U.S. District Court here.

The plaintiff, Anne E. Koller, 3, has no arms, no right leg and a severely deformed left leg. She was born at Walter Reed Army Medical Center here but now lives in Broken Arrow, Okla.

The company, formerly a unit of Richardson-Merrell, Inc., contends that "Bendectin has been used safely in over 31 million pregnancies," that "there has been no proof of any increase in the incidence of birth defects associated with its use," and that "there is no evidence that it caused Anne Koller's birth defects." In addition, a company spokesman said "there is a serious question when Mrs. Koller may have taken Bendectin."

The 14 children include a girl who is missing major portions of all four limbs. Six are armless: Anne Koller; a boy with shortened thigh bones; a boy with a severely deformed left leg, and Tawana Herring, 19, of Washington.

Matthew DeMeritt, 13, of Inglewood, Calif., born without legs, played "E.T." in the drunk scene in the movie of the same name, Butler said. Pauline Sand, 7, of Fairfield, Calif., has stubs for arms and no right leg. The company spokesman said there is "no record" that Pauline's mother took the drug.

For 20 years after Bendectin went on sale in 1956, it contained a now-abandoned anti-spasm compound, a vitamin, and an antihistamine called doxylamine succinate. Abroad, the company continues to sell the three-part mixture as Debendox, Lenotan and Meribental.

Two 1981 animal studies, called "preliminary and unconfirmed" in the current official Bendectin labeling, are cited in court papers filed by Butler. One showed a possible link between doxylamine and a potentially fatal hernia in rats; another found a hole in the heart wall of seven fetuses of monkeys given the current version of the drug, which combines doxylamine with a vitamin.

Butler also has filed animal studies indicating that doxylamine as well as many other antihistamines and potent drugs, can damage the nerve which controls the development of an embryo's brain and spinal cord and can upset normal limb development. The studies go back to one published in 1950 by a famed University of California biologist.

"The damage increases with the size of the dose and can result in either injury or death to the nerve," Butler said. The evidence on doxylamine "points very strongly to the conclusion" that it causes birth defects in humans, he asserted.

The FDA rated Bendectin "effective" in 1976 after the anti-spasm compound was dropped, but has rated it "ineffective" at an earlier point. In 1981, HRG director Sidney M. Wolfe asked the government to halt sales of Bendectin on the ground that the vitamin ingredient decreases the effectiveness of the antihistamine. He also has charged that FDA files contain not a single study showing Bendectin to be effective as required by law.

Excerpt from United States District Court for the District of Columbia Hearing Transcript of February 7, 1983

• • • • Monday, February 7, 1983

The above-entitled matter came on for hearing before the Honorable NORMA HOLLOWAY JOHNSON, United States District Judge, at 10:20 a.m. • • • •

[2] • • • • THE COURT: Counsel, I received this morning a motion for disqualification of counsel for — some of the counsel for plaintiffs; is that correct? • • • •

[3] • • • • THE COURT: Now, I just received the motion this morning, Mr. Lewis, with respect to disqualification.

Mr. Eaton, when did you receive it?

MR. EATON: Your Honor, I have not seen it. I called my office from the courthouse this morning and I was told that it had been delivered. I don't know when it came in, ma'am.

THE COURT: Do you know whether it was delivered Friday or today? You just don't know?

MR. LEWIS: Your Honor, it would not have been delivered until this morning.

THE COURT: It was only this morning.

MR. LEWIS: The papers didn't leave our office until 9 o'clock. • • • •

Excerpt from United States District Court for the District of Columbia Hearing Transcript of February 9, 1983

[65] • • • • THE COURT: I'm going to permit the deposition of Mr. Ryan and Mr. Allis, and let's see if we can't get them done this weekend. • • • •

Excerpts from United States District Court for the District of Columbia Hearing Transcript of February 10, 1983

[76] • • • • THE COURT: "The birth defects sustained by Anne Koller resulted from exposure to the drug Bendectin ingested by her mother from on or about"—

MR. ALLIS: From near the beginning of the pregnancy and certainly before the 28th day up until the 40th day.

THE COURT: Why don't we say "from conception"?

MR. ALLIS: Okay.

THE COURT: From conception?

MR. ALLIS: Shortly after conception. That would be more accurate, because she didn't take it at conception. "Shortly after conception up through the 28th day."

THE COURT: Why don't we do it this way, "by her mother after conception or on or about the 28th day following conception to on or about the 40th day following conception"?

MR. ALLIS: That's fine.

THE COURT: Is that in essence what you contend?

MR. ALLIS: Yes. • • • •

[83] • • • • MR. WALSH: We believe that the birth defect of Anne Koller is an example of femur fibula ulna complex. Dr. Falk, who was **[84]** one of the examining physicians for the plaintiff, so diagnosed it. Dr. Valle, who was our examining physician, so diagnosed it.

If that is correct, the cause of this complex is unknown. Dr. Falk concedes that in her report and Dr. Valle would so testify.

It has not been associated with any drug or environmental factor. It has occurred many, many years ago, long before Bendectin, long before modern medicine. It occurs in various countries of the world where Bendectin is not sold.

There are alternate causes which cannot be ruled out by the plaintiffs' proof. • • • •

Plaintiffs' Response to Defendant's Motion for Sanctions Filed February 14, 1983

United States District Court for the District of Columbia

(Caption Omitted in Printing)

PLAINTIFFS' RESPONSE TO DEFENDANT'S AMENDED MEMORANDUM IN SUPPORT OF MOTION FOR IMPOSITION OF SANCTIONS ON PLAINTIFFS' COUNSEL AND TO GIVE NOTICE OF DEFENDANT'S INTENTION TO MOVE TO STRIKE JURY DEMAND AND TO DISMISS COMPLAINT

• • • • The remainder of the article focused on 14 cases which were recently filed as adverse reaction reports with the Food and Drug Administration. Copies were sent to Defendant so that Defendant would be prepared with knowledge of the events. The Commissioner of the Food and Drug Administration was notified by Mr. Butler as part of Mr. Butler's attempt to protect the health of unborn children by urging that the drug be taken off the market. See Exhibit D (Affidavit of James G. Butler) and Exhibit C (Letters to FDA and Defendant). • • • •

Dated: February 14, 1983

BUTLER, JEFFERSON, DAN & ALLIS
By: /s/ JAMES G. BUTLER
James G. Butler
626 Wilshire Boulevard, Suite 914
Los Angeles, California 90017
Telephone: (213) 627-6041

• • • •

(Certificate of Service Omitted in Printing)

Exhibit C to Plaintiffs' Response to Defendant's Motion for Sanctions Filed February 14, 1983

BUTLER, JEFFERSON, DAN & ALLIS
Attorneys and Counselors at Law
626 Wilshire Boulevard, Suite 914
Los Angeles, California 90017

(Letterhead Abbreviated in Printing)

January 28, 1983

Arthur Hull Hayes, Commissioner
Food and Drug Administration
5600 Fishers Lane
Rockville, Maryland 20852

Re: Bendectin

Dear Commissioner Hayes:

Because of the overwhelming importance of the enclosed documents, I am mailing them directly to you instead of the Medical Section of the Food and Drug Administration. These are Adverse Drug Reaction Reports on the drug Bendectin some 14 in number. Each of the cases represents a child who is horribly malformed and in each of the instances the mother took Bendectin during the sensitive period of organogenesis.

It appears to me that solely on a humanitarian basis, the time has now come for the Food and Drug Administration to do something to warn the public of the dangers of Bendectin. Here in the United States, bilateral malformations such as this are extremely rare, perhaps as rare as one in a million, and it seems to me that it is most unlikely that even with this number that Bendectin could not be the cause. The previous information supplied to you by Congressman Doug Walgren of Pennsylvania's 18th District and particularly the studies of Dr. Crescitelli and Dr. Stuart Newman which demonstrates the mechanism of action of doxylamine succinate, the problem

ingredient of Bendectin, seems to me to demand an immediate review by the Food and Drug Administration to take this noxious product off the market before it can do any more harm.

Your immedi[illegible]e attention to this serious matter is requested.

Very truly yours,

BUTLER, JEFFERSON, DAN & ALLIS

James G. Butler

JGB:fl
cc: Dr. C. Everett Koop, Surgeon General
Encls.

Exhibit C to Plaintiffs' Response to Defendant's Motion for Sanctions—Continued

BUTLER, JEFFERSON, DAN & ALLIS
Attorneys and Counselors at Law
626 Wilshire Boulevard, Suite 914
Los Angeles, California 90017

(Letterhead Abbreviated in Printing)

January 28, 1983

Merrell Dow Pharmaceutical Company
Medical Department
2110 East Galbraith Road
Cincinnati, Ohio 45215

Re: Bendectin

Gentlemen:

Enclosed herewith please find 14 of your questionnaires properly filled out reporting 14 additional cases of bilateral

limb malformations where the mother ingested your drug, Bendectin, during the sensitive period. It is requested that you immediately notify the Food and Drug Administration of these cases under the appropriate reporting provisions of the federal regulations. The names of the cases are as follows:

1. Gregory Wayne Buell
2. Marco Cordova
3. Matthew DeMeritt
4. Rose Herring-Jones
5. Anne Elizabeth Koller
6. Lauren Malone
7. Yasmin Rasheeda Murray
8. Patrick Norris
9. Steven Brantly Prescott
10. Pauline Victoria Sand
11. Brian A. Wilson
12. Shane Ross Wood
13. Kimberly Wykoff
14. Christopher John Yarger

Very truly yours,

BUTLER, JEFFERSON, DAN & ALLIS
/s/ JAMES G. BUTLER
James G. Butler

JGB:fl
Encls.

Exhibit D to Plaintiffs' Response to Defendant's Motion for Sanctions Filed February 14, 1983—Affidavit of James G. Butler

(Caption Omitted in Printing)

AFFIDAVIT OF JAMES G. BUTLER

• • • •

James G. Butler, being duly sworn, deposes and says:

1. I am a member of the law firm of Butler, Jefferson, Dan & Allis, attorneys of record for Plaintiffs herein.

2. That on or about January 28, 1983, I prepared the letter dated January 28, 1983 to Food and Drug Commissioner Hayes with a copy to Surgeon General Koop, a copy of which is attached hereto and marked as Exhibit C. Included with these letters were the 14 adverse drug reaction reports as reported on the drug Bendectin as reported on the questionnaire which were attached to Defendant's Motion and marked Exhibit "A".

3. I have examined all of the evidence concerning the drug Bendectin and discussed the matter with experts, and I am of the opinion that the evidence is overwhelming and that the drug undoubtedly is responsible for malformations in children, and that the sooner it is taken off the market, there will be less danger to the unborn. I have devoted the last two years of my life to an unceasing effort to see that this drug is removed from the market. In talking to the press, there was no motive other than to get the drug off the market. I sent the letter marked Exhibit C.

/s/ JAMES G. BUTLER
James G. Butler

Sworn to before me this
14th day of February, 1983

/s/ CHRISTINA L. OXLEY
Notary Public

Christina L. Oxley
Notary Public District of Columbia
My Commission Expires January 1, 1987

EXHIBIT D

Excerpts from United States District Court for the District of Columbia Hearing Transcript of February 17, 1983

[27] • • • • THE COURT: All right. Well, let me ask you this: If you feel or if you felt that the public needed to know about this, why didn't you tell the public about this shortly after I continued the trial last year? Why did you wait until I'm ready to select a jury this month?

MR. BRANTON: Well, for that matter, the trial—

THE COURT: I mean, Bendectin, in your view, was as dangerous in '82 as it was in '83, isn't it? So, why didn't you tell it in '82?

MR. BRANTON: Your Honor, there have been other articles.

THE COURT: My question is, why didn't Mr. Butler write the letter in '82? Why did he wait until January of '83?

MR. BRANTON: Your, Honor, I cannot answer—

THE COURT: Well, you are representing—

MR. BRANTON: —as to why he didn't do something in '82.

THE COURT: Excuse me. You are representing Mr. Butler. You are suggesting to me that because of the public interest in this drug—don't worry about your time, okay. Don't worry about your time. I have taken up some of your time. So, don't worry about it. I'll give you as much time as you need, and I will proceed to my next question or **[28]** continue my question now.

You are suggesting that because of the public interest in this drug, because of the great danger of this drug, the public needs to know.

My question is: Assuming that both of those propositions are true, why was it not done in 1982 when I continued the case until January '83? Why did you feel that it was only necessary to do it a few days before the month in which we would perhaps proceed to trial arrived?

MR. BRANTON: Your Honor, I do not know if there is an answer for that question. The fact of the matter was, it was done when it was done. Why it was not done at an earlier date, I honestly could not tell the Court. We believed back then—I

say we—plaintiffs' counsel believed back then that it caused birth defects, and I would say that if anything, as time has gone on and as discovery has continued and now been completed, and now as we are poised on the eve of trial, we feel even stronger than ever before that the drug does cause birth defects. • • • •

[41] • • • • MR. BRANTON: May I just have a moment to confer?

THE COURT: Yes.

MR. BRANTON: Thank you.

(Mr. Branton confers with Mr. Butler.)

THE COURT: Mr. Branton, you may proceed. • • • •

[44] THE COURT: Mr. Branton, before you leave, am I to understand that as far as you are concerned, you have presented all that you wish to present with respect to this motion, that is, you did not wish to present any witnesses or anything like that; am I to presume that that is correct?

MR. BRANTON: We do not wish to present anything further.

THE COURT: This is all you wish is this argument?

MR. BRANTON: Yes. Thank you, Your Honor.

• • • •

Letter of Carl J. Schuck to The Honorable Gerard D. Reilly Dated February 25, 1983

OVERTON, LYMAN & PRINCE
A Partnership Including Professional Corporations
Lawyers
550 South Flower Street—Fifth Floor
Los Angeles, California 90071
Telephone (213) 683-1100

(Letterhead Abbreviated in Printing)

February 25, 1983

Hon. Gerard D. Reilly
D. C. Court of Appeals
500 Indiana Avenue, N.W.
Washington, D.C. 20001

Re: Koller v. Richardson-Merrell

Dear Judge Reilly:

In response to the request made at the Krystyna Janowski deposition, the following are the amounts paid, or incurred, on behalf of the witness:

Security Apartment	$2,426.50
Cardiac/Apnea Monitor for witness' infant	382.00
Car Rental (est.)	1,286.00
Medical Insurance	1,507.20
Transportation Expense (mother) for baby care	258.00
	$5,859.70

Very truly yours,

/s/ CARL J. SCHUCK
Carl J. Schuck P.C.

CJS/pl

cc: All counsel

Excerpts from Deposition of Patrick Ryan Held February 26, 1983

Patrick Ryan, called as a witness by Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Butler

[91] • • • • Q. Did you mention to Krystyna Janowski that, with respect to counsel, that Richardson-Merrell or Davis, Polk would be responsible for any fees for any such counsel? A. I can't recall whether that was specifically mentioned or not, Mr. Butler. That was—I believe that was implied. • • • •

[107] • • • • A. I don't think so, but I—it's possible. It's possible that I said to her, "I'm going to talk to your lawyer." It seems like I may have said to her, "I'm going to talk to your lawyer about putting you up someplace till this **[108]** matter can be resolved because I'm concerned about your safety." I may have said that, and it does seem to me like I did say something to that effect to her. • • • •

[199] • • • • Q. Did she say anything about "How about you guys bribing me" or "How about a bribe?" A. She did make the comment, something to the effect, "How about you guys bribing me" yes, sir.

Q. Did she say that to you? A. Yes, sir.

Q. And did she say "How about a bribe"?

[200] • • • • A. She said, "How about you guys bribing me?"

Q. What— A. Or something to that effect.

Q. What did you do when she said that? A. She was laughing when she said it. I interpreted it as a remark made in jest and I did not say anything to her when she said that. • • • •

Cross Examination by Mr. Cohen

[262] • • • • Q. Did you or any representatives of Davis, Polk, Crowe & Dunleavy, or your firm, Mr. Ryan, ever offer Krystyna Janowski $15,000? A. No, sir.

Q. Did you understand the December 28th letter that Mr. Butler wrote to the court mentioning the $15,000 to imply that it was your side, the representatives of the defendant that were doing the offering? A. That's how I understood the letter.

Q. Had there been any need for you to have Mr. Barnes investigate the allegation or could you have found out about that allegation simply by asking your colleagues? A. I understood there was no truth to it. There was nothing to investigate. * * * *

Plaintiffs' Submission in Support of Objection to Evidentiary Hearing on Fraud on the Court Filed March 2, 1983

United States District Court
For the District of Columbia

(Caption Omitted in Printing)

SUBMISSION BY PLAINTIFFS IN SUPPORT OF OBJECTION TO EVIDENTIARY HEARING ON FRAUD ON THE COURT

Plaintiffs hereby submit the attached documents and papers relating to the issue of fraud on the court. * * * *

Dated: March 2, 1983

Respectfully submitted,

BUTLER, JEFFERSON, DAN & ALLIS

By: /s/ JAMES G. BUTLER
James G. Butler
626 Wilshire Boulevard
Suite 914
Los Angeles, California 90017
Telephone: (213) 627-6041

* * * *

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Excerpts from Exhibit 2 Annexed to Plaintiffs' Submission in Support of Objection to Evidentiary Hearing on Fraud on the Court—Selected Medical Records of Mrs. Cynthia Koller

INITIAL PREGNANCY PROFILE — MOTHER'S PHYSICIAN COPY

	Check	Check and detail all positive findings below. Precede findings with symptom number.
1. Headaches		
2. Nausea/vomiting	✓	NAUSEA & VOMITING ALL DAY – ESP. IN EVE.
3. Abdominal pain	✓	SOME CRAMPING ESP. IF BEING ON FEET
4. Urinary complaints		
5. Vaginal discharge		
6. Vaginal bleeding		
7. Edema (specify area)		
8. Febrile episode		
9. Rubella exposure		
10. Other viral exposure		
11. Drug exposure		
12. Radiation exposure		
13. Other		

14. Last contraceptive ☐ None
Type _____
Last used _____

15. Nutritional Assessment
☐ Adequate ☐ Inadequate
Remarks: _____

16. Medications Since LMP
(Rx, non-Rx, vitamins) ☐ None
Describe: _____

Initial Physical Examination — Height | Weight 116 | Pregravid weight | B.P. 160/70 | Pulse | OPTIONAL

SYSTEM	Normal	Abn.	Check and detail all positive findings below. Use system numbers.
17. Skin			
18. EENT			
19. Mouth			
20. Neck			
21. Chest			
22. Breast			
23. Heart			
24. Lungs			
25. Abdomen			
26. Musculoskeletal			
27. Extremities			
28. Neurologic			
Pelvic Examination			
29. Ext. genitalia			
30. Vagina			
31. Cervix			
32. Uterus (describe)			12-14 wks
33. Adnexa			
34. Rectum			
35. Other			

Sony Pelvis	36 Diag. conj. 7 1/2	37 Shape sacrum MD	38 S.S. notch 7	39 Ischial spines BC	44
	40 Pubic arch 90	41 Trans. outlet AD	42 Post. sag. diam AD	43 Coccyx FLEXES	45

48. Classification: ☑ Gynecoid ☐ Android ☐ Anthropoid ☐ Platypelloid
47. Estimation: ☑ Adequate ☐ Borderline ☐ Contracted

Exam by _____

HOLLISTER maternal/newborn RECORD SYSTEM

Initial Pregnancy Profile Date

BEST AVAILABLE COPY

HOLLISTER™ *Trademarks of Hollister Incorporated

HOLLISTER INCORPORATED, 211 E. CHICAGO AVE., CHICAGO, ILL. 60611

PRENATAL FLOW RECORD

MATERNAL RECORD COPY

Risk Guide for Pregnancy and Outcome

Preliminary Risk Assessment (detail risk factors from the HHS below)

☐ (0) No risk factors noted
☐ (1) At risk
☐ (2) High risk

(F) F.H.D.M. - SCREEN
Hx DIGMAT. LGA @ 34 wks

Continuing Risk Guide (enter dates first noted and revise RISK STATUS)

Mo/day	Potential risk factors	Mo/day	High risk factors
/	3. Preg. without familial support	/	18. Diabetes mellitus
/	4. Second pregnancy in 12 months	/	19. Hypertension
/	5. Smoking (≥ 1 pack per day)	/	20. Thrombophlebitis
/	6. Rh negative (nonsensitized)	/	21. Herpes (type 2)
/	7. Uterine/cervical malformation	/	22. Rh sensitization
/	8. Inadequate pelvis	/	23. Uterine bleeding
/	9. Venereal disease	/	24. Hydramnios
/	10. Anemia (Hct < 30%; Hgb < 10%)	/	25. Severe preeclampsia
/	11. Acute pyelonephritis	/	26. Fetal growth retardation
/	12. Failure to gain weight	/	27. Premature rupt. membranes
/	13. Multiple pregnancy (term)	/	28. Multiple pregnancy (preterm)
/	14. Abnormal presentation	/	29. Low/falling estriols
/	15. Postterm pregnancy	/	30. Significant social problems
/	16.	/	31.
/	17.	/	32.

Flow Chart — Year / Pre-gravid; Date; Weight this visit; Blood pressure; Protein; Sugar; Est. weeks gestation (dates/size); Fundal height; Fetal heart rate; Edema; Urine; Initials of MD/CNM/RN; Patient's Age — 24

Initial Prenatal Screen			Additional Lab Findings		
Mo/day	Test	Result	Mo/day	Test	Result
10/25	Hct/Hgb	41.5	4/12	Hct/Hgb	35.7
/	Patient's Blood type and Rh	O+	/	Hct/Hgb	
/	Father's Blood type and Rh		/		
10/25	Antibody	O	/		
10/25	Serology	NR	/		
NR	Rubella titer	41:8	/		
/	Urinalysis micro		/		
/	Pap. test		/		
/	G.C.		/		

G	T	P	A	L	VCU	DOM	DOD
2		1		1	30 mo/day/yr 8/6/78		5/5/79

☒ Attends prenatal classes
☐ Cesarean section
☐ For sterilization
☒ Breast ☐ Bottle feeding
☒ Circumcision

Anesthesia

Baby's physician

11/20	116	110/70			12	12.14	O+			RTC 4 wks / as is BEDREST.
12/	115	/			/					HOLD NURSE WILL 2 → WILL PUSH TO GROUP PRACT.
12/18	118	110/70	N	N	16	17	NH	—		RTC 4 wks IF NOT PREGNANT SWD
12/19		/			17	U-3	+ protein			FHT's Doppler NH: Dalkon RTC 4 wks with 1 for FHTs: Dalkon
1/5	121	100/60	N	N	18	19	+ Doppler			ALL OK RTC 4 wks
1/12	119½	104/42	N	N	22	21+	+ O			Dopp CWD RTC 2 wks
3/2	123	100/60	N	N	29	27+	+ O			Dopp CWD Rhonchi Thin Outlined. 75
3/30	125	100/60	ϕ	ϕ	30+	31	ok	O		daily wdl. RTC 2 wks. - dopplers SCH
4/2	126	112/78	N	N	31	32	ok			Report BP 108/70 Felt dizzy this morn - now better. Ex lungs clear.
4/13	124	90/60	N	N	32+	33	ok	O	V+ FHT	Plan - 1) Bedrest today. 2) RTC 2 wks. SCH
/	/	/			/					
4/27	125	90/60	ϕ	ϕ	34	35	ok	O	V+ FHT	Ex lungs clear. RTC 2 wks SCH
5/11	123½	110/70	T	N	36+	34	ok	O	V+ FHT	Ex lungs, part, FT. RTC 2 wks. SCH.

Physician's signature

20 45704 27 07
ASO OPUD
KOLLER CYNTHIA
195 F AD USA
FLT

HOLLISTER maternal/newborn RECORD SYSTEM

Prenatal Flow Record

146

147

BEST AVAILABLE COPY

9 Jun '79

Pt. delivered a viable [female] Apagar 8/9, wt. 6-3½ c̄ multiple limb reduction defects—specifically completely absent R arm, a small 1/2 cm sub gravis from R hip c̄ no R leg, a flipper-like L arm s hand or fingers, and a deformed L leg c 4 toes. She also has a low set R ear.

Review of chart shows that the pt took Actifed and Afrin nose drops at approx 26 wk gestation. She also took prenatal vit. and Fe and Bendectin, but no other meds. Her family rx is . . . for D . . . and there is some "mild mental retardation" on her husband's side of the family. The only other significant rx is that her rubella titer was ⟨1:2 in Oct, repeat in Dec. was also ⟨1:8 (reflects no exposure to virus). No other known exposure to teratogenic substances or radiation.

Will discuss c̄ Staff & Peds *re* further evaluation.

S.Q.

Excerpts from Exhibit 3 Annexed to Plaintiffs' Submission in Support of Objection to Evidentiary Hearing on Fraud on the Court—Selected Medical Records of Anne Koller

CLINICAL RECORD HISTORY—Part I

NATURE AND DURATION OF COMPLAINTS (Include circumstances of admission)

Congenital Abnormalities
Terminal Mec Staining

HISTORY OF PRESENT ILLNESSES

This 6 lbs-3½ oz. Newborn [female] was delivered vaginally at 0435 hrs. spontaneously from a 25 y.o. G_2 Para 1-0-0-1 0+ Seral(-) White [female]. 1,5 min apgars were 8, 9. Terminal meconium staining present and meconium stained gastric aspirate returned *after* DeLee suctioning. Infants respirations spontaneous, color pink. Taken to intermediate nursery for observation because of the above and because of malformed/absent extremities

Mom is a G_2 Para 1-0-0-1 0+ Seral(-) active duty (CPT) Army Nurse who workes on Wd 52, WRAMC. Contractions began 8 June—2030 hrs, spontan, Born—0315 hrs—9 June. She states that this pregnancy was uncomplicated except for 1st trimester nausea (took Bendectin) and late 3rd trimester URI—lasted 24 hrs (took Afrin nosedrops & Actifed).

O: Bones felt in all extremities; mother admits only to Bendectin Afrin and Actifed ingestion; no other exogenous drugs taken.
A: otherwise grossly child WNC same
P: further studies to follow

Collins

CLINICAL RECORD NARRATIVE SUMMARY

Date of Admission	Date of Discharge
9 JUNE 79	13 JUNE 79

CHIEF COMPLAINT: Congenital abnormalities and terminal meconium staining.

HISTORY OF PRESENT ILLNESS: This 6 lbs., 3 1/2 oz. newborn female was delivered vaginally at 0435 hours on 9 June 1979 spontaneously. The mother is a 25-year-old, gravida 2, para 1, 0 positive, serology negative, white female. Apgars were noted to be 8 and 9 at 1 and 5 minutes, respectively. Terminal meconium staining was present, and meconium stained gastric aspirate was noted after DeLee suctioning. The infant's respirations were spontaneous; the color was pink, and she was taken to an intermediate nursery for observation because of the above and because of malforming or absent extremities. The pregnancy was complicated only by first trimester nausea treated with Bendectin and late third trimester upper respiratory infection which lasted for 24 hours, treated with Afrin nose drops and Actifed. The patient also took iron and vitamin pills during the pregnancy. She denies any other drugs or medical use. The patient denies smoking, alcohol intake except for a glass of wine approximately a week ago. The mother does have a Penicillin allergy, and the last Rubella titer in December of 78 was 1:8. Previous child was born at approximately 34 weeks gestation and weighed 6 lbs., 7 oz. and had minor respiratory distress syndrome and jaundice. The child was also treated for viral meningitis at four months of age. Otherwise, the child is healthy. The first pregnancy was complicated only by post partum hemorrhage which was treated with blood transfusions. The placenta was examined at the time of delivery and found to have several infarcted areas; otherwise unremarkable.

PAST HISTORY & FAMILY HISTORY: The history is pertinent only for diabetes in a grandmother. No history of congenital abnormalities in the family. The father does have mild asthma. There is a positive history of mental retardation in the family and several instances of club foot in the family.

SYSTEM REVIEW: The review of systems is noncontributory.

PHYSICAL EXAMINATION: In general, the height was 34.5 cm., head 35 cm., weight, 2,820 gm., temperature 98 axillary and pulse 150.

TWO WEEK WELL BABY CLINIC

Record answers to the following questions *(in weeks gestation as appropriate).*
Comment in the REMARKS section as needed.

PRENANTAL HISTORY:

1. Mother's age 25
2. G 2 P 2 AB ___ TAB ___ Other ___
3. Prenatal care began 2 wks gestation
4. Weight gain ~20 #
5. Medications taken: Bendectin Actified
   a. Vitamins with Iron ✓
   b. Prescribed medications —
   c. Over the counter drugs As above
6. Amount per day:
   a. Alcohol use —
   b. Cigarettes —
7. Illness Morning sickness
   a. Acute —
   b. Chronic —
8. Pre-eclampsia, treatment —
9. Vaginal bleeding —
10. Medical interventions —
11. Surgical interventions —
12. Special tests, GTT, OCT, Other ___
13. Planned pregnancy Yes

LABOR AND DELIVERY:

14. Length of pregnancy 9 months
15. Spontaneous/~~induced~~ labor ___
16. Vaginal delivery *(instruments)* N/A
17. Cesarean section *(reason)* —
18. Postpartum complications —

NEONATAL HISTORY:

19. Apgar 8/9
20. Birth weight 6-3 Length 34.5 cm Head circumference 35 cm Chest Circumference 35
21. Bilirubin problems —
22. Infection —
23. Feeding difficulties —

REMARKS: (Identify by question number) Congenital • • •

Excerpts from Exhibit 4 Annexed to Plaintiffs' Submission in Support of Objection to Evidentiary Hearing on Fraud on the Court—Selected Personnel Records of Mrs. Cynthia Koller

• • •

• • •

CPT Koller's performance of duty has been consistently outstanding during this rated period. She is an astute and sensitive nurse and has demonstrated her ability and effectiveness by planning, organizing and directing total patient care for all patients on this neurology ward. Her perception, insight and excellent judgment were well utilized in planning care for the chronically ill from admission to discharge. CPT Koller is a dedicated, loyal and enthusiastic nurse who shows great potential within the ANC. Her personal integrity and professional competence have brought credit to herself and the nursing profession.

• • • CPT Koller has performed her duties as SCN in an outstanding manner. Her nursing expertise and commitment to her profession is well recognized by all associated with this hard working officer. She is effective with staff, promoting

their growth in an atmosphere conducive to self direction. This young officer has progressed from staff nurse to SCN demonstrating rapid development as a clinical nurse and responsible officer. CPT Koller is a mature, self reliant professional who has contributed most generously of self to this difficult unit. I wish to express my appreciation for the outstanding manner in which she has served WRAMC and the Army Nurse Corps.

• • •

Excerpts from United States District Court for the District of Columbia Hearing Transcript of March 2, 1983

[15] • • • • THE COURT: I'm not as concerned with the issue of whether she heard Mrs. Koller say that she did or did not take Bendectin. I'm concerned with Mr. Allis's preparation of a statement and taking a statement to her for her signature. That's what I'm concerned with right now. That's what I told **[16]** you I would like you to address. • • • •

[18] • • • • THE COURT: What troubles me about Mr. Allis's testimony is his preparation of and taking to Ms. Janowski that statement that she signed and that you sent to me on the 29th or the 28th or whatever. I think I received it on the **[19]** 29th. I'm concerned about that statement. It appears that it was something that he prepared and took to her for her signature. In reading the transcript of the tape recording that Mr. Humphries made, there was something kind of unusual about Ms. Janowski saying, "Oh, you know, like, if you have a statement, why don't you pull it out of your pocket."

The circumstances, the statement itself, these are the things that concern me, and I would like you to address them as best you can, because I am concerned about them. Give me any other circumstances or anything else that you think I need to know about this before I make a decision on it. • • • •

[28] • • • • THE COURT: I will say to you gentlemen that since the completion of Ms. Janowski's deposition, and even really before I completed reading the full deposition, I was of the view that actually what I have here primarily is a conflict in

testimony. I wondered if I had any more than just a simple conflict in testimony as far as the merits of the case is concerned, all right. As far as the merits of the case is concerned, I wondered if this isn't any more than just a conflict in testimony and if the best way to handle this would be to proceed with the trial and leave it up to the defendant as to whether or not the defendant wished to place Ms. Janowski on the witness stand and vouch for her credibility.

But before I made that decision, I decided that maybe I needed to know just one other thing, and that is, I **[29]** wanted to know a bit more about the plaintiffs' allegations against the defendant as it related to the bribe. So, that's why I ordered Mr. Ryan to undergo a deposition, after having the Barneses and a few others undergo depositions. I wanted to know what Mr. Allis's role was with respect to that statement that was signed on the 27th of December, and that is why I asked him one day if he still opposed being deposed, and he told me he still opposed being deposed, but I ordered his deposition as well.

So, as far as I could then see or foresee, the results of this motion, everything should have been, I felt, in and complete by the time I reviewed the testimony of Mr. Ryan and Mr. Allis.

Unfortunately, I am not yet satisfied. I am not yet satisfied. I am not yet satisfied that I can proceed to the trial in this case even if I am able to call Ms. Janowski as my witness. I'm not convinced that I am as yet ready, and my concern is not so much the testimony of Ms. Janowski, which can be totally disregarded by the jury. As far as the merits of Mrs. Koller's case are concerned, Ms. Janowski's testimony can be totally disregarded by the jury. Only the jury can make a determination whether she's telling the truth or not, or whether they want to believe her or not, or whether they want to believe anything, any of what she has to say. So, it may be just totally disregarded by the jury.

[30] But I am very concerned about what counsel did with respect to Ms. Janowski once it became clear that she had started talking, and excuse the vernacular, out of school. That's my major concern, and I think I'm going to have to just take a couple of more depositions before I am able to make a final decision on that. • • • •

Excerpts from United States District Court for the District of Columbia Hearing Transcript of March 7, 1983, 10:00 a.m. Session

[9] • • • • THE COURT: • • • •

As you know, since January, I guess since January 3rd, the day when I ordered that a deposition be taken of Ms. Janowski—it may have been January 6th; I'm not sure—but since the first seven days of January, I have been very concerned about an issue which had been an absolute non-issue prior to that time, and that is whether or not some fraud has been committed upon the court. It has taken an awful lot of my time and attention. It has taken an awful lot of time and attention from both sides in this case. In fact, as you well know, we have had to spend a great deal of time in depositions and in pleadings relating solely to whether or not there has been a fraud committed upon this court.

Initially, it would appear to me, that the first concern was with the statements of Ms. Janowski, her statements to us through the deposition conducted in California. But I have since become very concerned about another issue, also an issue relating to fraud, and that relates to the statement of Ms. Janowski filed with this Court in late **[10]** December, the statement that was prepared by Mr. Allis and signed by Ms. Janowski.

I have so many serious concerns about that statement that I have concluded that the only way to resolve the problems that I foresee with respect to that statement is to conduct an evidentiary hearing on that aspect of it.

Now, I am not ordering a full scale evidentiary hearing as requested by the defendant touching upon all of the allegations made by Ms. Janowski, but rather, a limited evidentiary hearing as it relates to that statement prepared by Mr. Allis, signed by Ms. Janowski, and presented to me by letter dated December 28th and received by me on December 29th.

I had indicated my concerns last week to you gentlemen and that's why I ordered the deposition of Mr. Daum, since some evidence tended to show that Mr. Daum was the very first

person in the Butler firm to speak with Ms. Janowski after December 25th.

I cannot unravel this without a full evidentiary hearing. I just cannot unravel it without a full evidentiary hearing. I have reviewed Mr. Daum's testimony. I have gone back to Mr. Allis's testimony, and I cannot unravel it, and until I can unravel it, we are going to have a pall over this case, and I do believe that before we can begin the first word of evidence in this trial, I must unravel this puzzle as **[11]** to whether or not that conduct in any way reflects any type of fraudulent conduct on the court. There's just no way to go forward until I unravel that puzzle. It's just a puzzle to me.

The testimony so far has not been clear enough for me to make any type of determination, and thus an evidentiary hearing is going to be required. * * * *

[19] * * * * THE COURT: Very definitely, this matter is very limited.

Mr. Stein, I did get the impression from you during your comments that you were of the view that I am getting involved in all of these allegations that have been made against the plaintiffs. I really am not.

I am just concerned about something that Mr. Allis and Mr. Butler turned in to me, namely, that statement that Mr. Allis prepared, according to his deposition, and took to Ms. Janowski on the night of the 27th and had her sign. That is what is of concern to me.

As far as I am concerned, I don't even think Ms. Janowski needs to be here, because I am not focusing on Ms. Janowski now. I am focusing on Mr. Allis. That's who I am focusing on.

I want you to understand that surely you know that I know that I cannot proceed criminally in this case. I have no right to bring criminal charges, but I certainly think that in any civil case in which I am involved and in which an issue has come up, and I think a serious issue, but I can't **[20]** determine how serious it is just based on the depositions—I was hoping that I could, and that's why I ordered Mr. Daum to be deposed. I was hoping that hearing from him and whatever he knew about this might cause me to be in a position to untangle some problems.

I think I mentioned last week that some of my concerns I'm unable to articulate, because maybe enough questions weren't asked for me to untangle it, or maybe there was an area in the depositions that I thought should have been gone into a bit more, or maybe I thought maybe Mr. Allis wasn't responsive enough. So, I said, okay, give him the benefit of the doubt; let me hear what Mr. Daum has to say. So I spent Friday reading Mr. Daum's testimony and going back over Mr. Allis's testimony, and there is still some area that I'm not sure of and I want to have an evidentiary hearing.

Now, that evidentiary hearing is not designed to take the place of any hearing or investigation that our grievance committee might choose to do and perhaps will be asked to do. That has nothing to do with any criminal charges. I certainly have no right and know I have no right to determine whether any criminal charges shall be filed. That's not my role.

My role here, I believe—and I want you to know it is a troubling role. This case has indeed become troubling since I learned about Krystyna Janowski. It has **[21]** become troubling. But on the other hand, I believe that the Court has to be balanced. It has to be balanced. And the Court has to know how this statement of December 27th came about, and the best way for me to determine that, I think, is through an evidentiary hearing.

I am not at all concerned in this hearing with whether Ms. Janowski ever talked with Mrs. Koller or not, whether Mrs. Koller ever told Ms. Janowski she never took Bendectin—that's not of any concern to me—whether any Walter Reed records were destroyed by Cohen & Kokus or, if not destroyed, somehow caused to disappear. I'm not concerned with whether or not Mr. Henke said stonewall it. I'm not concerned about any of those things.

I am just concerned right now with what were the circumstances surrounding that letter. It's not really a letter. It's a statement, that statement signed by Ms. Janowski. I know it was signed by her, based upon the transcript of the tape recording. * * * *

[24] MR. STEIN: It would be of great value. It would be of great value to know the precise area.

As I understand it—these are just observations, Your Honor—it is not the credibility of Ms. Janowski that is of interest to the Court at this time.

THE COURT: Not really.

MR. STEIN: It's the events which led up to the presentation of the statement and what is in the statement.

THE COURT: Yes. That's my primary concern.

MR. STEIN: Thank you, Your Honor. * * * *

Excerpts from United States District Court for the District of Columbia Transcript of March 7, 1983, 3:30 p.m.
Telephone Conference Call

[5] * * * * THE COURT: Well, let me say this to you, Mr. Stein. I am not really and truly moving forward on that Davis Polk memorandum, but I did ask you if you read that memorandum because of all of the memoranda that I have received from Davis Polk touching upon the issue of fraud on the Court, and this goes back from sometimes in January, and then also I think in late February Davis Polk filed a memorandum concerning dismissal of the case or waiver of jury demand. I am not moving on that either.

[6] In fact, I am not moving on any motion made by Davis Polk, but I am moving on an issue that they also addressed in some respect in that March 2nd memorandum, but I am not moving on that memorandum. That is not the basis for this hearing.

MR. STEIN: Okay. That's very helpful to me—

THE COURT: Okay.

MR. STEIN: —in putting this in a way that I can analyze it.

THE COURT: This is really on my own motion. I admit that after reading Mr. Allis's deposition, believing that maybe this could be resolved if I heard from Mr. Daum, but then having read Mr. Daum's testimony on Friday, I still have questions in

my mind as to what was the purpose of that statement. I feel that the only way I can determine whether or not that statement had as its purpose—not necessarily its sole purpose—but had as its purpose an affront to the integrity of this Court, that has to be ruled on before I can move into the trial of this case.

So, I'm saying in essence that the hearing that I have scheduled is somewhat related to what Davis Polk has been able to perceive about that statement of Krystyna Janowski's, but I think it may involve just a bit more than that, and the relief requested in that, I have never—in fact, I'm not even sure what relief they requested. But I do **[7]** know this: I'm not proceeding on that hearing based upon their requested relief. * * * *

[9] * * * * MR. COHEN: We don't think Janowski's credibility is at all in issue. It seems to me, if one member of the firm or one party on his side states under oath that a certain thing happened and was done and Mr. Allis states that a different thing happened and was done, I don't think Ms. Janowski has anything to do with that.

So, all I'm saying is that it seems to me the focus of that is Allis per se, and perhaps Butler, whom we haven't deposed, because Mr. Daum made it clear that everything that happened on the 27th was done with the approval of Mr. Butler. I just don't see what Janowski would add to this.

[10] * * * * THE COURT: Well, Mr. Stein and Mr. Cohen, let me say this. It appears to me, and I could be wrong and it could later develop that I'm wrong, that on this limited issue that concerns me, whether Krystyna Janowski is, as she is so affectionately called by Mr. Butler, a "pathological liar" or not, is not at issue. Whether her credibility is at issue or not and whether the statement she prepared is true or false just to me does not appear to be the issue that I am trying to resolve, and, as I said, if I have been less than **[11]** able to frame it in a way that is totally understandable to everyone, it's because I am so inundated with facts, facts, facts, and unfacts, and nonfacts as a result of this case that the fact that I still know there is such a case is a maricle [sic]. But I really am doing my best to frame for you what concerns me, and that is, whether this firm, particularly Mr. Allis, attempted through the use of this statement to assault or affront the—assault is really the

better word—assault the integrity of this Court.

I do see possible conflicts. You see, I've never seen Humphries. I've never seen—well, I have seen Mr. Daum in the courtroom, but I don't know just what is what. But having read most of the depositions that were taken since the Janowski deposition, which commenced sometimes in January, I have that question in my mind, and I just believe that the only way to resolve it is to let those people who can resolve it just testify.

As I said, this is no criminal proceeding. This is just a proceeding to determine whether or not Mr. Allis or anybody else in that firm has tried to take unfair advantage of this Court's integrity through presenting that particular statement to me on December 29th. That's what I'm trying to determine. • • • •

Order of the District Court Setting Evidentiary Hearing Filed March 8, 1983

FILED—Mar 8 1983—James F. Davey, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1258

ANNE ELISABETH KOLLER, *et al.*,
Plaintiffs,

v.

RICHARDSON-MERRELL, INC.,
Defendant.

ORDER

WHEREAS this action was commenced in May 1980 and has been the subject of extensive pretrial discovery, and was set down for trial commencing March 3, 1982; and

WHEREAS by order of the Court entered February 17, 1982, said trial date was adjourned until January 10, 1983, and subsequently adjourned further to January 17, 1983, and

WHEREAS both plaintiffs and defendant have communicated with the Court since December 1982 concerning the possibility of a fraud upon the Court in the maintenance of this action; and

WHEREAS the Court has continued the trial date of this action to permit discovery with respect to the allegations of fraud on the Court and has ruled that the attorney-client privilege with respect to issues of fraud on the Court has been waived as to plaintiffs; and

WHEREAS the Court has ordered extensive discovery relating to the issues of fraud on the Court, including the further depositions of plaintiffs Cynthia and John Koller and the depositions of Krystyna Janowski, Luis Castillo, Floyd Humphries, Allan Ezrin, Peter Clemente, George Barnes, Nancy Barnes, Nicholas Allis, Patrick Ryan, and Richard Daum; and

WHEREAS it appears from said depositions that a statement was prepared by plaintiffs' counsel on or about December 27, 1982, and caused to be signed by Krystyna Janowski and submitted to the Court by plaintiffs' counsel on or about December 28, 1982 (the "Statement"); and

WHEREAS the Court has completed pretrial of this action but is not satisfied by the foregoing discovery as to certain issues concerning the Statement and whether the testimony of Krystyna Janowski was attempted to be suppressed; and

WHEREAS one of the plaintiffs is a minor and may require separate representation in connection with the protection of her interests; now therefore,

IT IS HEREBY ORDERED that an evidentiary hearing shall be held before this Court commencing at 10 a.m. on March 10, 1983, on the following issue: whether any fraud has been perpetrated on the Court by any member of the firm of Butler, Jefferson, Dan & Allis or any agent or employee thereof in

connection with the actions of said firm during the period December 22 through December 31, 1982, in connection with the obtaining of the Statement from Krystyna Janowski and the submission of Statement to the Court; and

IT IS FURTHER ORDERED that said evidentiary hearing shall be held in order to determine whether any further action by this Court is necessary or appropriate in the interest of the infant plaintiff or the other parties to this action, or in the interests of justice and the proper preservation of the jurisdiction of the Court.

DONE and ORDERED this 8th day of March, 1983, at Washington, D.C.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

Excerpts from United States District Court for the District of Columbia Hearing Transcript of March 8, 1983

[7] * * * * THE COURT: Well, let me say this, Mr. Stein. The hearing may result in my finding that there is nothing that needs to be done. The hearing may result in my finding that there may be something that should be done, and if I find that there is probable cause to believe that there is something that should be done, then I will give you notice as to what I think—have you show cause as to why maybe Mr. Allis shouldn't be held in contempt of Court, or why I should not issue a rule to show cause against Mr. Allis, or why I should not order that this Butler, Jefferson, Dan & Allis firm be taken off this case because of improper conduct.

It is so bad that I don't know what is going on in this case. I have done my best to try to find out what is going on in this case, and I have been, unfortunately, stopped on every side. I've been stopped.

So, the only way for me to try to find out what is [8] going on here with respect to the statement that the Butler firm sent me, received by me on December 29th, saying in effect that Krystyna Janowski had recanted everything that may have been said or was said—I can't be sure of the language; I don't have it in front of me—regarding Mrs. Koller, is that a true statement? Is that a true statement? How was that statement obtained? With what knowledge of the facts was that statement obtained? Is in fact the Butler firm trying to suppress testimony by Ms. Janowski by sending me a statement signed by her under penalty of perjury that nothing that was previously said was true, that it was a result of a $15,000 bribe offer?

I have even permitted your clients to depose people with respect to their allegations that this was a $15,000 bribe offer, that the only reason Ms. Janowski said anything was because she was promised a $15,000 bribe, she was promised a comfortable apartment, maybe a trip to the Caribbean, and I don't know.

It has just been unconscionable, all of the allegations and counter-allegations and other allegations that I have received during the course of this case.

I am not being, I think—I know I'm not being facetious and I don't think I'm being out of line when I say that we have reached a point in this proceeding where I need to know what is going on, and I need to know whether what is [9] going on is in the best interest of this minor plaintiff.

True, you are new in the case, as new as yesterday as far as I'm concerned, Mr. Stein. I don't mean to be unkind about it. I saw you in my courtroom one previous day. We were in here for a short period of time that day. I don't know what you were able to pick up on that day about the flavor of this case, but I can assure you that virtually since the third or fourth day of January of this year, there has not been one day in my life when I have not been involved in this Koller case, and I have in my head, if not on my tongue—I have in my head, if not on my tongue, an awful lot of information that does not compute easily, and it doesn't compute easily because, as I've said, I think the Court has been left out of a lot of things.

Now, I have read these transcripts of depositions and I have been very concerned about the way some of the witnesses have responded. I have been very concerned about the way counsel for plaintiffs have conducted some of these depositions.

Why, my goodness, there was one deposition I read where it appears that Mr. Butler, no matter what the question was, Mr. Butler answered it in making his objections.

I need to be able to see these people before me. I need to hear them testify. I need to know what is going on in this case, and, true, as I said, I'm not going into this **[10]** hearing saying that this case is going to be dismissed. There is no reason for me to believe that this case should be dismissed, notwithstanding what findings or what evidence might come out of this hearing that I plan.

I'm not saying that any sanctions will come out. I'm not saying that the plaintiffs will not be able to convince me that there is nothing for me to be concerned about, but the depositions don't leave me with that impression. The depositions leave me with the impression that there is something that I must be concerned about, that I must know about, that I must try to determine, not whether Krystyna Janowski is a credible witness or not, but whether or not whatever Krystyna Janowski knows or does not know plaintiffs have tried to keep from me, and, of course, as I said, I have volumes of transcripts in there. You are welcome to read mine if you wish of Janowski's testimony. It will take you forever. It took me almost forever to read it, because she never says yes or no. She never answers any question short of 150 words, and, as I said, you are welcome to read them if you wish. You are welcome to read anything in this case.

There's nothing in this case that has been hidden from anybody, but there is evidence, in my view, that is being hidden, or not being presented is perhaps the better way to put it. It's not being presented, and I do wonder whether the submission of that statement to me on December 29th was **[11]** designed in some way, to use a word that Mr. Cohen has often used in his deposition in questioning witnesses, to just bring to a halt the Janowski statements by presenting that to me, when

less than one week later—it may have been less than one week later—I ordered her deposition. It's my recollection that I ordered her deposition on either January 3rd or January 4th or January 5th. I'm certain it was in the first week of January that I ordered her deposition, and things have gone downhill from the time I ordered her deposition, and I ordered this deposition notwithstanding that statement that was presented to me, and now that, the circumstances surrounding that statement, have me very troubled, and that's the purpose of this hearing. • • • •

[15] • • • •

Mr. Cohen came back in with a list of witnesses. I think you told me yesterday in the courtroom that you would consult with Mr. Cohen later about your witnesses. So, if Mr. Cohen has witnesses that he believes will help clarify this, I will let him present those witnesses.

Now, if those witnesses basically are adverse in the sense of they are primarily plaintiffs' witnesses, the plaintiff herself or the investigator for the plaintiffs, Mr. Humphries, or Mr. Allis, sure, as I told him, he can cross-examine and treat them like adverse witnesses. I think that's appropriate.

If you choose to call Pat Ryan or George Barnes, and I think the other man's name was Larsen, if you were to choose to call them to help clarify this, I would give you the same courtesy, to treat them as adverse witnesses, because you don't have them under your control.

MR. STEIN: I don't take any issue with that whatsoever.

THE COURT: As I said, this is my motion. I'm concerned. I am concerned about these circumstances. I am concerned whether Mr. Allis or Mr. Allis and the Butler firm presented that statement to me for reasons other than valid and genuine reasons. • • • •

[19] • • • •

Well, I would say this, Mr. Stein. There is very definitely a motion pending before me by plaintiffs requesting an evidentiary hearing. They have also requested discovery. I mean, it hasn't been just the defendant who has sought discovery in this

case—not discovery but new discovery as it relates to Janowski, but the plaintiffs have also sought discovery. They have also sought evidentiary hearings, and I have tried to balance discovery as best I could between both sides.

[20] The $15,000 bribe offer, of course, which plaintiffs have really focused in on greatly, resulted in my requiring the attorney from the defendant's side who contacted Ms. Janowski to be deposed. Their investigators, Barnes and his wife, and Larsen, I think, I also granted them permission to depose them.

So, this has not been just a one-sided affair. There have been, as I said, charges and counter-charges, allegations and counter-allegations. There have been many things going forward in here.

Now, whether or not Mr. Allis has violated a canon of conduct is something that I don't intend to decide or to do anything about, and as I think I mentioned to you yesterday, it is very likely—I'm not saying that it shall happen—but it is very likely that I shall refer whatever conduct I deem inappropriate to the committee, but not at this stage. I'm not that certain yet.

I know that the committee exists and I know its function, but I also know that the function of that Committee on Grievances is to look into attorney misconduct that may have had some effect on the Court or a case. Maybe the attorney has done nothing to affront the integrity of this Court, but there is that issue as to whether or not it has been. It came about as a result of my review of Mr. Allis's deposition. * * * *

Exhibit 17 to Plaintiffs' Petition for a Writ of Mandamus Filed with the United States Court of Appeals for the District of Columbia Circuit on March 9, 1983

(Caption Omitted in Printing)

DECLARATION OF STELLA GRAY

I, STELLA GRAY, being first duly sworn, declare and say as follows:

1. My name is Stella Gray. I reside in Los Angeles, California. I am employed as Office Manager by the law firm of Whann & McManigal, 315 W. Ninth Street, Suite 920, Los Angeles, California.

2. On February 26, 1981, Krystyna Janowski began work as a Legal Secretary under my supervision. For two or three months prior to this, she had worked here as a temporary employee.

3. This employee was known to me variously as Krystyna Janowski, Krystyna Flores, and Krystyna Janowski Flores. She terminated employment from this firm in June of 1981.

4. While working for this firm, Ms. Janowski was involved in several dishonest acts. On one occasion, she told a firm partner that a friend was desperately hurt in Houston, Texas and that she planned to visit him for several days. Upon her return from Texas, Ms. Janowski privately explained to me that she had told a lie. Actually, she had left her husband to stay with an ex-boyfriend for several days. On another occasion, Ms. Janowski came to the office on a Saturday, packed her clothes in some empty file cases, took $46 in petty cash in addition to postage stamps and shipped the boxes to Texas. Upon her return from this trip, she did admit to me that she had taken the money and the stamps. She admitted also that she had had no intention of returning, realizing that she would have been found out if she had stayed on. Further, Ms. Janowski entered the office several times after working hours in the company of her husband. They carried on in such a

noisy and obvious manner as to attract the attention of both the security guard and parking attendant who registered their complaints about this to me. Shortly after she began working as a permanent employee, Ms. Janowski stated to me that she had 10 dependents. Accordingly, no income tax deductions were taken on her regular paychecks. Early in 1982 [sic], a formal notification came to the office from the Department of Internal Revenue stating that Ms. Janowski would have to be considered as a single person with no additional dependents for income tax purposes. Finally, on a Thursday in June of 1981, Ms. Janowski accepted her regular paycheck and immediately quit her employment. She did not remain for the balance of the week for which she had already been paid. I have never seen Ms. Janowski since nor have I been aware of her whereabouts.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 8th day of February, 1983, at Los Angeles, California.

/s/ STELLA GRAY
Stella Gray
Declarant

Exhibit 18 to Plaintiffs' Petition for a Writ of Mandamus Filed with the United States Court of Appeals for the District of Columbia Circuit on March 9, 1983

AFFIDAVIT

THE STATE OF TEXAS
COUNTY OF CAMERON

I, Roy C. Turcotte, being duly sworn, deposes and says:

1. My name is Roy C. Turcotte. I am an attorney at law, licensed to practice in the State of Texas. My office address is 2370 North Expressway, Sunrise Mall, Suite 17, Brownsville, Texas 78521.

2. I know Christina Janowski. During 1980, she was employed as a legal secretary by my office partner J.L. Covington and myself at 954 E. Madison Street, Brownsville, Texas 78520.

3. During her period of employment she made false statements to an opposing counsel concerning my client's secreting of assets in regards to a divorce litigation.

4. Christina Janowski was discharged for cause. Christina filed a claim for unemployment compensation with the Texas Employment Commission, but her claim was not allowed.

5. During her period of employment I found Christina to be emotionally distraught and untrustworthy.

Dated: March 1, 1983.

/s/ ROY C. TURCOTTE
Roy C. Turcotte

SUBSCRIBED AND SWORN TO BEFORE ME THE undersigned authority on this the 1st day of March, 1983.

/s/ CINDY PEREZ
Cindy Perez, Notary Public In
and for Cameron County, Texas.

My Commission Expires:

8-4-84

Excerpts from United States District Court for the District of Columbia Evidentiary Hearing Transcript of March 10, 1983

CYNTHIA KOLLER, called as a witness by the Defendant, having been first duly sworn, was examined and testifies as follows:

Direct Examination by Mr. Cohen

[11] * * * * Q. Now, could you tell the court what Mr. Butler told you in that phone conversation that you had at 10 A.M.—at 12 noon your time, 10 A.M. Los Angeles time, on December 27, 1982? A. He related to me that there was a person that worked **[12]** in his office who had made some sort of a statement that I had told her that I did not take Bendectin when I said that I took it, and basically—basically he told me that, and basically what he was doing was asking me again, did I in fact take Bendectin when I said that I took it. * * * * **[16]** A. Well, what I testified to in the deposition here about that they would probably need to get a sworn statement from me, I believe that he did that on Monday. He may have done it on Tuesday. **[17]** On Monday and Tuesday, there was a call—at least one call on Monday, and then I made one in the afternoon to him, and then there was another one on Tuesday, and those calls are—to me, they're all one thing. Trying to separate them out is very hard for me. * * * *

NICHOLAS R. ALLIS, called as a witness by the Defendant, having been first duly sworn, was examined and testifies as follows:

Direct Examination by Mr. Cohen

[26] * * * * Q. Now, Mr. Allis, did there come a time when you learned—excuse me. Strike that question.

Am I correct in my understanding, Mr. Allis, that on **[27]** Sunday evening, December 26, 1982, there was a message left

on your answering service by one of the paralegals in your law firm named Richard Daum? A. Yes, on my answering machine.

Q. What in essence did that message say? A. It said, "Call me, it's very important."

Q. And did you then respond to that and call Mr. Daum? A. Yes.

Q. Could you relate to the court what Mr. Daum told you? A. Well, to the best of my recollection, Mr. Daum essentially told me that Krystyna Janowski had called him that day and/or seen him that day and said that George Barnes, defendant's investigator, was pressuring her to sign a false statement and that this false statement would have had to do with Mrs. Koller taking Bendectin. * * * *

[33] * * * * Q. Did you discuss at all the fact of whether Krystyna Janowski had called Davis Polk? A. No. I don't recall that.

Q. And at this point in time, 10 A.M. Monday, December 27, 1982, you had no knowledge as to whether Krystyna Janowski had called Davis Polk; is that correct? A. That is correct. * * * *

[38] * * * * Q. And she had been your secretary since June 1981? A. That's right. * * * *

[39] * * * * Q. Now, there came a point in time after this conversation with Ms. Janowski where you visited her at the hospital; **[40]** is that correct? A. That's correct.

Q. And this was on December 27, 1982, at approximately 11 A.M.? A. Yes.

Q. How long had you talked to her on the phone before leaving the Butler firm to go visit her? A. Matter of a couple of minutes, five minutes.

Q. Was anything substantive discussed about this fraud or bribery attempt? A. Well, yes. I can recall that I asked her simply to tell the truth. My approach in the telephone conversation was that she should—if the defendant or their agents were doing the things that she said that they were doing, that she should stand up and tell the truth, and I made that kind of an appeal to her, and she said—as I recall, she said that she did

not want to be a hero. She may have said at that point that all she wanted to do was to go to Mexico and leave, that kind of a conversation.

I think I said that if Mr.—"If the Barnes and Associates is doing the things that you have alleged, this is in line with what we have understood about them doing previously in Australia and some other places in the United States, and that this isn't right, and it's not fair, and we should make this known."

[41] * * * * Q. Now, you went to the hospital and you had a **[42]** conversation with Krystyna Janowski, and that conversation lasted for approximately two hours; is that correct? A. Approximately an hour-and-half, hour-and-three-quarters, two hours.

Q. And during the course of that conversation, she reaffirmed what it was—she reaffirmed what Richard Daum had told you Sunday night; is that correct? A. Essentially. * * * *

[47] A. At the very end of the conversation, my impression was that I would not be seeing her in the office that afternoon and she was certainly not going to accompany me to the office.

Q. And you did not indicate to her at that time that you were going to come out to her house with a statement that you had already prepared to have her sign; is that correct? A. I did not specifically indicate that to her. * * * *

[48] * * * * Q. Now, when you got back into the office, approximately what time was it, California time, that is, after your meeting with Janowski? A. I would say approximately 1:30 or so.

Q. Did you report to Jim Butler as to what had occurred? A. Yes. * * * *

* * * * Q. And I assume you did not tell Jim Butler that Janowski had called Davis Polk and told Davis Polk that Mrs. Koller did not take Bendectin during the first trimester? A. Well, we discussed that as a possibility, and it was very apparent to me—well, she told me or she lead me to believe in what she had said at the hospital, and I left the hospital with the definite understanding that she had made a telephone call to Davis Polk.

However, this telephone call, she said, came after Mr. Barnes or some other person from the defendant had initially contacted her. She specifically denied saying that—she specifically denied telling me that she had said **[49]** anything to the other side about the case being fraudulent or anything of that sort. But when I got back to the office, we sat around and talked about what had happened, and it was our—I wanted and tended to believe my secretary. I felt very embarrassed for her. I felt very embarrassed for myself. She was my secretary, and I—Mr. Butler at one point said, I recall, that "I'm sorry, Nick. I think that she has made a statement to them of some kind."

All logic led us to believe that she must have said something to the defendants concerning the case being a fraud or else there would be no explanation for the defendants to be out at her house and at the hospital pressuring her, following her around, pressuring her to make a false statement.

But she did not tell me that she had called up Davis Polk and made any such statement.

Q. But did she tell you, Mr. Allis, at the hospital, that she had called Davis Polk? A. All I can say is that I left the hospital with the definite understanding and impression that she had called Davis Polk. I made out a draft affidavit within two days of that conversation. I say in there that she stated to me she'd made a telephone call to Davis Polk after initially being contacted by the other side, but she denied saying anything to the other side about the case being fraudulent.

I do not specifically recall her saying—stating **[50]** that she made the phone call. The statement that does stick out in my mind that she said was a conditional kind of a statement, because I thought, when I was talking to her at the hospital, there's got to be something more behind this than Krystyna is telling me, because she's saying that investigators, et cetera, have come out of the blue, trying to pressure her to sign a false statement. I knew there had to be something more behind it, so I kept trying to bring her back and say, "Krystyna, the thing that I can't understand is why would these people be out pressuring you and following you around to sign a false statement? Why you?" And she would come up with an excuse

about—that "They must have heard that I was very dissatisfied with the firm, and that the first day it rained I wasn't going to come in," and I'd leave that. I didn't want to pressure her, didn't want her to close off the conversation. But I would bring it around again, "The thing I can't understand, Krystyna, is why would they be picking on you."

She finally said a conditional type of statement, "Well, Nick, what if somebody or what if I had made a phone call?" Right at that point, I knew that she had made a phone call of some kind, and she—then we talked a lot after that, and I—she may very well have said that, "I made a phone call," because I left the hospital with the definite understanding that in fact she had made a phone call. But I don't **[51]** recall her making that statement now.

Q. But you do recall—having reviewed in preparation for this testimony—that you prepared an affidavit a couple of days after this particular conversation in which you were ready or prepared to state, as you do in an affidavit, subject to the penalties of perjury, that Ms. Janowski had stated to you that she had called Davis Polk; is that correct? A. I put in that draft affidavit that she told—that she stated that she had called Davis Polk, and that —but that she had denied telling them the case was a fraud and that the phone call came after she was initially contacted by George Barnes.

Q. Now, when you got back to Mr. Butler's office and you were discussing your conversation with Janowski, did Mr. Butler say, "Well, Nick, don't worry about it. I know what's going on. She has called Davis Polk and she has told them that Mrs. Koller did not take Bendectin during the first trimester"?

Did he indicate that he had knowledge like that to you? A. No. He—I remember one definite impression he had was that she was crazy, that it had to do with her having given this premature birth, and I remember us talking about what must have happened to lead up to all these events, and the logical explanation could only be that she had said **[52]** something to somebody to lead Davis Polk or the—to lead George Barnes to be out at her house day and night, as she had described, although there was a part of me that wanted to

believe what she was saying. I think I put forth that position more than most people.

Q. Did you decide to do anything after you relayed—did you decide or did Mr. Butler decide to do anything further after you relayed to him your conversation with Ms. Janowski at the hospital on the morning and afternoon of December 27th? A. At some point in the afternoon, I know I thought it was best if some third person listened to her to see that—to be able to observe her and listen to her, see if she said the same things, and, so, it was decided that Floyd Humphries, a licensed investigator, would be the logical choice. She—

* * * *

[56] A. It would have been—I believe it would have been late in the afternoon.

Q. And that's Monday, the 27th? A. Right.

Q. And at this point in time, you have no knowledge that Ms. Janowski had called Davis Polk and told them Mrs. Koller didn't take Bendectin during the first trimester? A. I had no such knowledge, to the best of my recollection. I can say that definitely, to the best of my recollection, but we assumed that she must have. * * * *

[57] * * * * A. * * * * Now, she left me with the understanding she'd made a telephone call. So, the natural inference was that she made a telephone call, and in that telephone call she said something to indicate to the defendant or to George Barnes that she had some important information, and since they were allegedly trying to get her to sign a false statement about Mrs. Koller taking Bendectin, the natural inference is that she told them—in this telephone call she said something to that effect. * * * *

Q. I don't mean to cut you off, but let me ask you this. If you felt that a secretary in your firm had **[58]** violated a client's confidences and contacted the other side, wouldn't you fire her? A. Well, the first thing I would do, which I did in this instance, was to try to find out what was going on. Now, Ms. Janowski denied to me that she had broached any confidences. She denied that she had told the other side anything about a fraud or about—she said that that was not true, the false statement that they wanted her to sign.

Now, I wanted to believe my secretary, quite frankly. It was embarrassing to her. I knew that she was a little bit emotionally unstable. It was embarrassing to me, because I had—I was her immediate supervisor.

So, there's a whole context of things that were happening then, and I was trying to get to the bottom of them.

Q. But did I understand your testimony to be just a few minutes ago that you and Mr. Butler had a belief that this secretary in your employ, Krystyna Janowski, had called Davis Polk and told them that the Koller case was a fraud? You had that belief, a strong belief; is that correct? A. I think Mr. Butler felt that way more than I did. I had a—I thought that she must have said something to them to lead them along, such as that the case was—well, that—what I thought was that she might have made some comment to lead them to believe that she knew something about Mrs. Koller taking Bendectin, because that was the **[59]** statement—the false statement that she said that they wanted her to sign, but at the same time, I wanted to give her the benefit of the doubt, and I hoped that everything that she was telling me was true.

In other words, I hoped that she was telling the truth that she had not contacted them and told Davis Polk anything about a false statement or anything of that nature and that these people had just somehow come out to her and were trying to pressure her to sign a false statement. • • • •

Q. At this point in time, was any thought—I'm talking now about the afternoon— A. I should also add, because you asked, that I think that I thought, because she had been under a tremendous amount of pressure with the premature child and other problems, that maybe she had had some momentary breakdown. So that there was that consideration, too. I was—I was embarrassed about the affair. I wanted to get to the bottom of it. I was concerned about her. I was concerned about our client, naturally.

Q. Was there any motivation on your part when you were talking with Mr. Humphries and Mr. Butler to protect the Butler firm, to protect yourself, to protect Koller, or to protect your economic interest in the Koller case? A. There were so

many thoughts, but my primary thought was to try to find out what was going on. But if the **[60]** defendants were trying to pressure her to sign a false statement, certainly this was of great importance to our client and our case. So, certainly I had an interest in my client and in what was going on in the case, but my primary—and I was also concerned about what the other attorneys thought. I was also concerned about my secretary. My primary concern was to get to the bottom of this; what is going on; is this happening, what she is describing, and, if so, what has led up to it. • • • •

[62] • • • • Q. But he got the tape recorder at your request? A. I wanted—I wanted to have that conversation taped. I don't recall asking him specifically, "Go out and buy a tape recorder." To me, it would have been more of a mutual talking over what we should do, and that's the agreement we arrived at.

Q. Who gave Mr. Humphries instructions that during the meeting with Janowski, the taping should be done surreptitiously? A. Again, the word "instruction," I don't like the use of the word "instruction." I think it was more of a mutual agreement. I know it crossed my—

THE COURT: Mutual agreement between whom?

THE WITNESS: Mr. Humphries and me.

I know it crossed my mind to have her dictate into a tape recorder her thoughts, but we didn't do that. I think part of the reason was, the same way I mentioned in the morning, we would be going out there at her—in other words, she would be talking to us at her desire or agreement and she could terminate that conversation at any time, and I thought that it was very important to have her relaxed and just tell what had happened, because I still didn't think I had the complete story from her when I talked with her in the **[63]** hospital, and I thought that if she were asked to say something into a tape recorder, this might make her back off in some way, particularly if she was embarrassed about the whole thing, as I thought that she was back at the hospital.

Q. As I understand your deposition testimony and your testimony here today, Mr. Allis, the whole reason for taking Mr. Humphries was to have another person hear what she had to say and evaluate it, because you were still in the process of conducting an investigation; is that correct? A. That's correct.

• • • • Q. Now, did you tell Mr. Humphries that Ms. Janowski had called Davis Polk and told them that Mrs. Koller did not take Bendectin during the first trimester? A. I did not tell him—well, let me answer it this way. No, I did not tell him that Mrs. Koller—that Mrs. Janowski had told me that, but I certainly told him that, "This is our understanding and assumption of what must have happened, that she has admitted that she made a telephone call to Davis Polk; she denies saying anything, but this must have happened." • • • •

[65] • • • • Q. Did you tell Humphries that you had made arrangements with Janowski to come by her apartment on the evening of December 27, 1982? A. I did not say that, but I certainly would have told **[66]** him that at the hospital she wrote out her address and said that she would be happy to see me any time, and we talked in the hospital about her going to her house, her making out a statement there.

Q. Did you tell Humphries that the contents of the statement that you were going to take out on the 27th had been discussed by you and Janowski? A. Yes, certainly.

Q. You told him that that statement— A. Not that particular statement, but the items in it had certainly been discussed with her, because that's why I put them in there.

In other words, she told me that Barnes and Associates—that was the chief—that was the culprit, as I understood it from talking to her—that Barnes and Associates were trying to get her to sign a false statement concerning Mrs. Koller not taking Bendectin, that she would not—never sign such a statement because it would be fraudulent. • • • •

[68] • • • • A. • • • • So, I felt sympathetic towards these problems she expressed in the deposition—at the hospital. And, so, I thought that because of her own mental

imbalance, combined with these hostilities, perhaps she had done something that was very embarrassing to her and that she had come to realize that this was something that she hadn't done—that she should not have done, and she was trying to set things straight and tell the truth, and the truth was that she had never heard Mrs. Koller say anything about not taking Bendectin during the first trimester or any other time, and the truth was that the defendants were trying to get her to sign a false statement, and the truth was that the defendant—again, when I say the defendant, I'm really talking of Mr. Barnes, because that was my understanding of who was **[69]** doing this, and that was consistent with other things we had heard about Mr. Barnes, and the truth was that Mr. Barnes was offering her things such as a comfortable apartment, and taking care of her baby and all of her wants if she would sign this statement. • • • •

[74] • • • • Q. And you also had formed your belief, you and Mr. Butler—perhaps Butler more strongly held—that what **[75]** has triggered all of this is the fact that Janowski has probably called Davis Polk and told them that Koller didn't take Bendectin during the first trimester; is that not a fair statement? A. It is not a fair statement. It would be a fair statement if you just simply said that we thought that she had probably called Davis Polk and told them something to the effect that Mrs. Koller said she hadn't taken Bendectin or some other things about the case that would lead them to believe something was fraudulent or funny about it, yes.

We thought that she'd probably done that by the end of that afternoon, and I think Mr. Butler thought that more than I did.

Q. Now, if the purpose of you and Humphries going out to Janowski was allegedly to have Humphries hear what she had to say and evaluate it, can you tell me what was the need for you to prepare a statement? A. Yes. I thought that she was going to go to Mexico or she said that she was going to go to Mexico or wanted to go to Mexico. I did not want her to go to Mexico. I wanted her to stay and tell the truth.

If she did go to Mexico, I thought it was important to have something on the record, and that was one of the reasons that I wanted her to sign this statement.

I also felt that if, in addition to saying **[76]** essentially the same thing to a third person, Mr. Humphries, if she were also willing to sign a statement and thereby go on the record, that this was a pretty good indication that what she was saying was true. And I also felt that just as a matter of recording what the interview was and the meeting was that evening, that it would be a good idea for purposes of reconstruction of it and trying at a later time, if anything did happen, such that she went to Mexico, and if something did come up in terms of something that she had said to the other side, that it would certainly be good to have something solid we can point to.

That's why I wanted her to sign a statement, assuming that it was true and assuming that she said the same thing in her apartment, and that's the reason why I also thought it would be a good idea to get her down on a tape recorder.

Q. But your purpose in this statement was to get a true, accurate and full chronology of the events; is that not correct, sir? A. It was certainly an attempt to get a true and accurate chronology, but it was in no way attempted to get a full chronology. Somebody had suggested at the very end of the afternoon, "As long as you're going out there, why don't you type up a very simple statement."

Q. Who was that someone, sir? **[77-85]** A. I don't recall. And that's how this statement came about. So, I just tried to put the guts of what I thought she—that what I knew and thought that she was telling everyone, which was that Barnes was trying to get her to sign a false statement, offering her things for it, and that the matters contained in the false statement had to do with Mrs. Koller taking Bendectin, and she wouldn't sign it because it wasn't true. • • • •

[88] • • • • Q. And the purpose—your testimony is that the purpose of this statement was to reduce to writing the events that had occurred that were related to you by Janowski; is that correct? A. The purpose was as I stated before.

One of the purposes is something along the lines of what you have stated, which was to get down the guts, the important guts of what she was telling us was going on, which was that she was being asked to sign a false statement and being promised things for it, and she wouldn't do it because it wasn't true. • • • •

[89] • • • • Q. Was one of the purposes of this statement to have Janowski retract any statement she gave Davis, Polk? A. If she had made a statement that was contrary to this to Davis, Polk, certainly I wanted her to say what the real truth was, and that would involve retracting it.

Q. Was that the primary purpose of the statement? A. The primary—

[90] MR. STEIN: Your Honor, again, I think this is repetitious.

THE COURT: That isn't. That question isn't repetitious.

The question is was that the primary purpose of the statement.

THE WITNESS: The primary purpose of the statement—well, first of all, there were several purposes of the statement. I'm not sure I can tell you what was the primary purpose.

THE COURT: Can you tell us whether it was one of the primary purposes, because that's the question?

THE WITNESS: Certainly.

If she had made a statement to Davis, Polk, or to George Barnes that she had heard Cynthia Koller say she did not take Bendectin, certainly I wanted that, the truth, the true statement, the true facts, to be set down here. And that would involve a retraction of any statement like that, yes. • • • •

[91] • • • • Q. Is there some reason, Mr. Allis, that you didn't include, and since you have testified you wanted the true facts in this statement, the fifteen thousand dollar bribe attempt? A. There's no particular reason except that all I

was trying to put in this statement was the very guts of what she told me in the hospital.

She had not mentioned anything about a fifteen thousand dollar bribe in the hospital.

I also stated there are many things that are not in this statement; for example, she told me very clearly and in detail about how they were threatening her, and I didn't put that in. * * * *

[92] * * * * A. I didn't say that he had been trying to get her to sign a statement because I thought it was George L. Barnes and Associates that was the real culprit, and it made sense to me from what we knew about Barnes that that could be the fact. * * * *

Q. At the time that you had her sign this statement you also still had the belief, did you not, sir, that she had called Davis, Polk first; is that correct? A. I thought it was—I thought that she had said something to Davis, Polk at some time to lead them on, or to George Barnes.

I don't think I specifically thought she has made a telephone call first, before being contacted by anybody.

But I thought that at some point in her dealings that she had said something to them to lead them on to believe that Mrs. Koller hadn't taken Bendectin.

It was certainly probable, logically, that she **[93]** would have had to have initiated this in some way.

Q. But my question was— A. But as far as a definite belief, I always wanted to believe her, and part of me did believe her.

Q. Let me ask it this way, sir.

At this point in time that you had her sign this statement, you did not know if this was a truthful statement; is that correct? A. Yes, I thought it was a truthful statement, definitely, absolutely.

Q. You thought the defendants had attempted to bribe her first, is that it, without being contacted by her or anything of that nature? A. This statement doesn't say that.

It says Mr. Barnes and other—

THE COURT: That isn't what he asked, about what the statement said. He asked is that what you thought. * * * *

[94] * * * * Q. And during the course of the conversation that you had with her you pulled this out of your pocket and she sort of signed it without basically reading it closely; is that a fair statement? A. That is not a fair statement at all.

She spent a long time reading it. She made corrections to it.

Q. Did she say to you, sir, that, I better make some changes, you know, in the statement so that it will sort of look proper, and Mr. Humphries says, yes, yes, you've got the idea; do you recall that occurring? A. I recall a statement in the tape to the effect, something about her making corrections, it would look better if I made corrections, some off-the-wall comment such as that. * * * *

[95] * * * * Q. Did you agree to an arrangement in which she would not have to come into your offices, but, instead, you would send a typewriter to her house so that she could work at home? A. After the statement was signed, yes.

Q. Did you ever send the typewriter to her house? A. No.

Q. She remained on your payroll until she quit; is **[96]** that not correct, sir? A. I believe she did.

Q. And after this, although she never came to her office and did one day's work, and you never sent the typewriter, she continued to be paid; is that not correct? A. I gave her a paycheck on the 31st, which was four days later.

The next day we got a letter from — indicating that she had contacted the other side and said the case was fraudulent, something of this nature, and so I didn't know what was going on, and she didn't come in.

Then, when she got down there Friday she was very upset and yelling about kidnapping the baby, and where is my paycheck, and I gave her whatever she was due.

I presume that was pay up to that Friday, but I don't really recall. * * * *

[98] A. There was nothing formal discussed about her pay during those times in any way, shape or form, other than she was, hopefully, still an employee.

I wanted her to stay working and not go to Mexico.

And so when she came in on that Friday to get her paycheck, I went up to the office and asked for the paycheck for what she was owed, and I assume that that was pay up until that day, because she was still on the payroll. * * * *

[99] * * * * Q. Another area that I understand was discussed that wasn't on the tape was your conversation with her concerning a psychiatrist; do you recall that, Mr. Allis? A. Yes.

Q. All right.

And you suggested, as I understand it, that if the pressures got too great on her she might want to see a psychiatrist; is that correct? A. No.

After the statement had been signed and when we were standing up, getting ready to go, again, thinking of her welfare and my impressions of her, I asked her something to the effect of, if you feel like you need a psychiatrist to talk to, or a counsellor to talk to, I'm sure that insurance would cover it. She said that she did not.

I should point out—I think it's undisputed—I had asked her that, advised her to see a counsellor about nine, ten months previous to that, when she had written a memo of that kind to our office manager, also.

So I thought that she must feel pressured by all of these events, even though she seemed so inappropriately almost calm and enjoying the situation.

Q. But if you believed that, sir, why would you in Defendant's Exhibit One, your statement, say, as you typed it **[100]** in the afternoon, in your office, "Today I feel calm and my mind is free and clear"?

Why did you put that in? A. Because she seemed that way.

As I just mentioned, she seemed almost inappropriately, I thought, calm and on top of things.

She spoke so easily. She was laughing and chattering, both at the hospital and at her apartment.

Q. But you didn't believe that inside that she was that way; is that correct? A. Yes. She seemed that way. But I thought it was inappropriate to the situation that she was describing. * * * *

Q. Did she agree to sign this statement prior to your even removing it from your pocket? A. Yes. I thought that—yes, she did.

I thought that that was the gist of why I removed it, that the conversation led up to—covered the essentials in the statement.

She essentially confirmed that, and then asked if she would be willing to sign a statement to that effect and she said she would. That was before I took it out. * * * *

[101] * * * * Q. Now, are you familiar with a letter that was signed by James Butler and sent to Judge Johnson at the United States District Court for the District of Columbia, which was dated December 28th, 1982? A. Yes.

Q. Did Mr. Butler show you that letter? A. Yes.

Q. Did you read it? A. Yes, I'm sure I did.

Q. Did you suggest to Mr. Butler that in terms of explaining to the Court what had occurred here, and to be extremely truthful, it might be better to include the fact that we believe that Janowski had called Davis, Polk?

Did you discuss that with him? A. I do not recall discussing that with Mr. Butler.

Q. In the letter did you indicate to Mr. Butler that in the spirit of candor it might be better to mention the fact of Mr. Humphries and the surreptitious tape recording? A. I had no conversation with Mr. Butler about including that, but the tape recorder certainly bears out my opinion what the statement says, and everything she told us before. * * * *

[102] * * * * Q. * * * * Did you and Mr. Butler discuss that it would probably be in the interest of candor better to inform the Court that Janowski was going to remain on the payroll at home and would be allowed to work at home, at her own time and her own choosing, and that a typewriter was going to be sent to the house?

Did you think about including that? A. You've said a lot of things.

We did not think about including that.

That was in no way remuneration.

At the very end of the tape, after she signed the statement, she says, this has nothing to do with remuneration, but could

you have my paycheck and my vacation check ready for me on Friday, so Luis can pick it up.

Q. We have established, though, have we not, sir, that **[103]** from the week of December 27th until the time she quit she did not come into your office or perform any services fo you; is that correct? A. She did not.

Q. And she was paid. A. I assume that that paycheck I gave her on Friday included that, but certainly there had been plenty of days she hadn't come in, including days between the birth of her baby and then, that she had not come in and been paid for.

Q. Did you think about including in the December 28th letter to the Court the fact that Mr. Carl Schuck was involved in this matter, as related to you and Mr. Butler by Richard Daum? A. In the letter to the Court?

Q. Yes. A. I don't recall any conversation with Mr. Butler to that effect, but certainly it would have only supported our version of what happened, because, as I understood it, Mr. Schuck was out there with the defendants, trying to do what she said what was happening. * * * *

[105] * * * * Q. Now, as I recall your testimony, Mr. Butler had a strongly held belief—much stronger than yours—that Janowski had called the other side initially; has that not been your testimony? A. My testimony has been that Mr. Butler and I—I think Mr. Butler more strongly than I—thought that she must have said something to the defendant at some point in time to lead them on, and the logical—I think our logic, based on what she said, was that she perhaps had made a **[106]** telep'one call, and that's the time in which she said that something was—that Mrs. Koller hadn't taken Bendectin.

Q. Is that contained in this letter? A. Out [sic] belief to that effect? Q. Yes. A. No.* * * * A. * * * * **[107]** She said that the defendant—she had made this mistake—an emotionally somewhat unbalanced woman with a premature child and so forth—said something to lead them on, and despite that fact, the defendants kept going back and trying to manipulate her to sign a statement that would contain this false statement all these days, while we knew nothing about it.* * * * ,

Cross Examination by Mr. Stein

[120] * * * * Q. * * * * Let's say you had doubts about Mrs. Koller's claim. Does that mean you're authorized to abandon it? A. Not as I understand it.

But I want to reiterate, I never had the slightest doubt about her claim.

Q. But I want to fasten your attention on this. Let's say you did have doubts. Does that mean you **[121]** would have been warranted in withdrawing from her representation? A. No.

Q. And you've said that you do not have doubts. A. I have no doubt at all.

Q. But the fact that you do or do not have doubts, is that really significant for an advocate? A. It's significant for me as an advocate, but under the canons, I don't think so. * * * *

[122] * * * * MR. STEIN: You may proceed.

[123] THE WITNESS: She is being put up in a six hundred dollar apartment, paid for by the defendant. Previously, she had been living in a two hundred apartment.

She is being given a rental car.

Her consort is an illegal alien and is being given legal assistance for his immigration problems.

Certain medical expenses were paid for her, although the attorney, Schuck, said they would be reimbursed out of insurance or something. And there are, as I understand it, unspecified other expenses.

Q. Did you become aware of any specific mental problems that she had after this Janowski affair commenced on December 27th, 1982? A. Yes.

Q. What did you become aware of? A. Previously, she had entered a plea of innocent by way of insanity. This was back in the late sixties or middle sixties.

She was under psychiatric and psychological treatment from four or five different people during that period of time.

MR. COHEN: Your Honor, this objection I intend to let stand, and of course, Your Honor has to rule on that.

Seems to me that the instruction on this was that **[124]** Ms. Janowski's credibility was not at issue in this hearing; this was a narrow hearing, dealing with the purpose of the statement and the letter, and the dates, December 26, 27th and 28th.

For that reason I object. * * * *

* * * * THE COURT: I don't agree with you. I don't agree with you, and as far as I'm concerned, Mr. Stein, you have been outside of the scope of the direct examination a bit **[125]** too far anyway.

Now, they have not objected, but clearly, what he knows about her past mental history, unless it relates to something that you first submit or determine through questions, had to do with her answering a different questions on that day, it's irrelevant.

So I sustain the objection. * * * *

Redirect Examination by Mr. Cohen

[131] * * * * A. * * * * I wanted to find out what the truth was and to try to establish in some more definite way what was going on, and we notified the Court what was happening the very next day.

[132] Q. On December 27th, when you went out to the apartment to clearly establish, can you indicate to the Court what additional information you gained at her apartment on December 27th that you did not know earlier? A. Yes.

What was important to me, in terms of—I think what you're getting at is that she said the same thing again that she had said several times.

MR. COHEN: Your Honor, I'm going to interrupt now.

THE COURT: Please just respond to the question.

THE WITNESS: I think that this is additional, Your Honor.

THE COURT: Well, just tell the additional information.

THE WITNESS: In other words, what was important to me in establishing this was the—

THE COURT: I don't care what was important to you.

Just tell me what the additional information was, and then after you tell me what the additional information was, you might choose to tell me what the importance to you is, of the additional information.

THE WITNESS: It was additional information to me that she was willing to sign a statement and say the same things before a third party. That was additional and corroborative. It wasn't different, but it was additional.

[133] THE COURT: Her willingness to sign the statement, you considered additional information about the allegations that had been made?

THE WITNESS: It wasn't different, but I thought it was additional.

In other words, it was one thing on top of what had already been said orally. And if she were willing to actually sign the statement, as well as say it before a third party, to me this was additional information that what she was saying was true. * * * *

[136] * * * * THE COURT: * * * * When were you first aware, or had the feeling, that Miss Janowski had been in contact with the defendant, or its agents, regarding substantive matters touching on the Koller case?

THE WITNESS: Well, during the visit to the hospital she—well, I would say Mr. Daum also said that she was being pressured. So I got the impression and understanding that she had had conversations. I didn't know what they were about. * * * *

[137] * * * * THE COURT: * * * * When were you first aware, or had a feeling, that Miss Janowski had been in contact with defendant, or its agents, regarding substantive matters touching on the Koller case; that is, saying anything about Mrs. Koller, or anything about any aspect of the Koller case?

THE WITNESS: I suspected, when I was in the hospital with her on Monday morning, that there must be something more to it than she was telling me.

THE COURT: All right.

THE WITNESS: I didn't know, but I suspected it and tried to get it out of her.

THE COURT: So you first had that feeling while you were at the hospital?

THE WITNESS: That is correct.

THE COURT: All right.

THE WITNESS: Of course, there was also a part of me that also wanted to believe her, and did believe her.

THE COURT: Well, that is not the question. The question you have answered. It was while you were at the hospital.

[138] THE COURT: When did Mr. Butler first mention his view to you that he believed she had been in contact with them on substantive matters?

THE WITNESS: On Monday afternoon we discussed that she must have said something, which must be something substantive, to the other side, in order to lead them on in some way, whether it was after being contacted by them or at some other point.

THE COURT: About what time would that have been, since the afternoon spanned several hours?

THE WITNESS: It could have been anywhere from the time I got back, which was approximately 1:30 or 2:00 o'clock, until 3:00 or 4:00. • • • •

[143] • • • • THE COURT: Why did you have any question in your mind about truth or falsity before you went to the hospital?

THE WITNESS: Because the whole thing sounded so bizarre: that George Barnes was trying to get her to sign a false statement.

I just wanted to find out what the truth was and get it out.

THE COURT: You knew—

THE WITNESS: The whole story sounded so bizarre about floor plans, fire-proof cabinets, and so forth, that—

[144] • • • • THE COURT: So the story that you had heard from her and Mr. Daum, you deemed so bizarre that you felt that that story was not true? • • • •

THE WITNESS: No, but I wanted to sit down with her and go over the version, go over the situation, and find out what was true and what was not true.

I certainly did not come to the conclusion then that her version was not true. In fact, there was a part of me that believed her all the way through. Even after we were there in her apartment, I believed her, definitely. There was that part of me that wanted to believe her. I could not face believing that my own secretary had done something that was treacherous.

So there was a part of me that always believed that what she was saying was completely the truth.

Then, after we got to her apartment, I believed it even more, after we left.

In fact, I called up Mr. Butler, and I— • • • •

[146] • • • • THE COURT: • • • • Well, if you came in at approximately 9:00 o'clock, **[147]** can you recall whether you saw the letter before you went to take what is normally a lunch break, or did you see it after the lunch break?

THE WITNESS: I really have no recollection of when I saw the letter. I can construct—what I would construct is that when we get things delivered from Davis, Polk, they are ordinarily delivered in the morning.

If this were delivered in the morning, I presume I saw it then. If I had to guess, I would say I saw it in the morning, but I have no recollection.

THE COURT: I really don't want you to guess, and that is why I was trying to help your recollection—

THE WITNESS: Yes.

THE COURT: (Continuing)—as to whether you saw it between the time you came in and the time you would normally take a lunch break, or after your lunch break and before you left for the evening.

Let me see if I can help you in this respect: Did not the letter from Davis, Polk, of December 27th, have as enclosures the telephone messages from Miss Janowski?

THE WITNESS: No, I—no.

THE COURT: You do not recall seeing those?

THE WITNESS: I am quite sure it did not. I would have remembered that.

THE COURT: Well, the contents of the letter **[148]** were, for want of a better word, "damning"; were they not?

THE WITNESS: Yes.

THE COURT: And even with that type of a message, you still say you cannot recall whether you saw it in the morning or in the afternoon?

THE WITNESS: I don't recall when I saw that letter, Your Honor.

THE COURT: Okay.

THE WITNESS: There were so many bizarre events happening in that two-day period that it is—it seemed like it was one on top of the other.

THE COURT: What else bizarre happened on the 28th, besides the receipt of that letter?

THE WITNESS: Well, the fact that this had happened on the 27th. We got into the office on the 28th. I am sure I went in and told Mr. Butler about the statement she had signed and probably told him what had taken place.

THE COURT: That was not bizarre.

THE WITNESS: Pardon?

THE COURT: That was not bizarre. So what else was bizarre?

THE WITNESS: I thought everything was bizarre, Your Honor. I really did. I thought that the whole event—the whole event was the most bizarre thing that has ever happened to me.

[150] • • • • THE COURT: All right. On her last full day on the job, did she act as your secretary?

THE WITNESS: Yes. I—there were different things being handled at different times, but I don't recall. • • • •

She mentioned it several times in the fall: how she would like to work at home after the baby was born, and she could have tapes at home. She mentioned it to the other people that I know about, also, that—

THE COURT: Well, I am talking about you.

THE WITNESS: She mentioned it to me.

[151] THE COURT: And had she mentioned that to you before the birth of the child?

THE WITNESS: Yes. she did. • • • •

[153] • • • • THE COURT: • • • • I think you also testified earlier today that Miss Janowski denied anything about a fraud. How did the question of fraud come up for her to deny?

THE WITNESS: Well, in the hospital she told me: the defendants are trying to get me to sign a false statement that Mrs. Koller said she did not take Bendectin.

And, in my own mind, I wanted—what I kept telling her was—I kept bringing the conversation back to that, because she would then diverge into current events, and so forth.

And I said—kept telling her: I can't understand why they are out there talking to you, pressuring you to sign a false statement. Why would they pick on you?

In my own mind, it was only logical that she must have led them on in some way. And so I said: Did you say anything to them concerning Mrs. Koller taking Bendectin, or anything else that would result in them being out there, after you like that?

And she always specifically denied that. She denied that she had said anything like that to George Barnes, or anybody else.

And there was a part of me that wanted to, and did, believe that. But there was another part that—

[154] THE COURT: I believe you have answered the question, Mr. Allis.

Why did you think it was a good idea to get Miss Janowski's statements on tape?

THE WITNESS: Again, to—I wanted—particularly if she went to Mexico, I wanted to have some sort of a record of it. That was one thing.

Another thing is that if—I wanted to be able to reconstruct what happened, and so there would be an accurate reconstruction of what happened, during that conversation, or interview.

So that is essentially why I wanted to tape it.

THE COURT: Now, at the same time you also wanted to have a third party listen in?

THE WITNESS: That is right.

THE COURT: Is that correct?

THE WITNESS: Yes.

THE COURT: What was the purpose of having a third party listen in, if you were going to tape her anyway?

THE WITNESS: Well, the third—the investigator would be doing—I wanted the investigator to listen to her, so that he could try to evaluate and listen to her. There was no—there was no—there were no facial expressions, et cetera. There is no guarantee that a tape would be successful.

[155] I had never taped anybody before, and I wasn't carrying the tape, myself. He was going to be doing the taping.

So a tape would be no substitute, in my opinion, in any way, for an on-the-spot, third-party ooserver. • • • •

THE COURT: All right. You also testified earlier today that you felt uncomfortable speaking to Miss Janowski. Why was that? • • • •

[156] • • • • THE COURT What about on the 27th?

THE WITNESS: On the 27th?

THE COURT: Yes.

THE WITNESS: I—again, the whole thing was so bizarre. I didn't know whether she was crazy, or what was going on.

So there was a little part of me that day that felt a little uncomfortable talking to her, and I certainly didn't want

to talk to her again without—unless there was some good reason to, like a third party, until she came into the office and made out the kind of a three- or four-hour statement that she said she was going to.

So far as feeling uncomfortable otherwise, I definitely, after getting the letters from the defendant on the 28th, and then the contact with Mr. Schuck—I certainly felt uncomfortable about talking to her on the 3rd—on Friday, the 31st, and then, again, on Monday, the 3rd, which I think is where I said I felt uncomfortable talking to her.

THE COURT: Well, you knew about Mr. Schuck before you went out to the hospital; didn't you?

THE WITNESS: I did know about Mr. Schuck. I had been led to believe that he was basically working with them. And later, after we got the letter from the defendant, **[157]** it was presented that he was an independent attorney. That they had arranged for him.

And then I found out who he was, and Mr. Butler talked to him, and he spoke—I guess the whole—

THE COURT: My question was: You knew about Mr. Schuck before you went to the hospital; did you not?

THE WITNESS: I knew of the existence of Mr. Schuck.

THE COURT: Well, you knew that he had also been in touch with Miss Janowski; did you not?

THE WITNESS: I don't recall whether I knew that before I went to the hospital, but I certainly knew it at the end of the visit to the hospital: that an attorney named Schuck had come to her apartment on Friday and—

THE COURT: Did not Mr. Daum give you and Mr. Butler those cards that morning when you came to work?

THE WITNESS: He may very well have. I don't have a specific recollection. But I certainly—as I say, I certainly knew it within a few hours of them. • • • •

[160] • • • • THE WITNESS: I do not recall, Your Honor, who made the initial suggestion to prepare a simple statement.

THE COURT: Well, it was not quite a simple statement; was it?

THE WITNESS: Yes.

THE COURT: It was a simple statement?

THE WITNESS: Yes.

THE COURT: What was simple about it?

THE WITNESS: Well, it is very short. All it intends to do is to set down the very essential, bottom line of what she was telling us, in just a couple of sentences. And that is what was simple about it. • • • •

[163] • • • • THE COURT: • • • • What was there in the—I will get to that later. You testified earlier today that after leaving the hospital and talking with Miss Janowski, that you did not have the complete story; is that correct?

THE WITNESS: Right. That is correct.

THE COURT: Well, would you tell me why you felt you were competent to preparre a statement for her to sign, based upon your conversations at the hospital.

THE WITNESS: Yes, because she had reiterated what was in that statement a number of times at the hospital, and I was not trying to give her a third degree, and I was not trying to question her, but simply to draw her out.

But, even in that process, she had—I had subtly questioned her: I can't understand why they are doing this, that type question.

And she had essentially reiterated what I put in that statement several times, and that is exactly what I understood she had also told Mr. Daum.

So I was convinced it was true.

THE COURT: So you knew, then that that statement did not have the complete story, because you had not heard the complete story?

[164] THE WITNESS: The statement that I drew up was not intended in any way to be a recitation of everything that she told me at the hospital, or even everything that was relevant at the hospital.

But it was intended to be an accurate summary of the essential, bottom-line point, and it was: that she said that—she told me several times and she told Mr. Daum, as

I understood it, that the defendant was trying to get her to sign a false statement which had to do with Mrs. Koller not taking Bendectin.

And that this was a false statement, and she was being offered, she told me, an apartment and other things for that statement.

And it was not true. That she had never had any such conversation with Mrs. Koller, and never heard Mrs. Koller say anything like that.

And that had the definite ring of truth to me, and I believed it.

THE COURT: At that time—

THE WITNESS: And I believe it today.

THE COURT: Well, your belief is not at issue here. • • • •

[165] • • • • THE COURT: Now, just before we went for the luncheon recess, you said that the additional information that you had, following your visit to her home that evening, was her willingness to sign the statement that you prepared and presented to her.

Just what did her willingness to sign mean to you?

[166] THE WITNESS: It meant that the statement was truthful. That if she were willing to sign it—

THE COURT: That is, the statement that you had prepared?

THE WITNESS: Yes.

That if she were willing to sign that, and sign it under penalty of perjury, that that was a good indication that it was truthful.

I also will say that the additional information also included her saying this again before a third party.

THE COURT: And that third party was Mr. Humphries?

THE WITNESS: Right.

THE COURT: She knew Mr. Humphries; isn't that correct?

THE WITNESS: She did.

THE COURT: She knew that he was an investigator whom your office had used?

THE WITNESS: She did, and I thought that she felt comfortable—

THE COURT: I am not asking you what you thought.

THE WITNESS: (continuing)—with him.

THE COURT: But she knew that?

THE WITNESS: Yes.

THE COURT: All right. • • • •

ALLEN T. EATON, called as a witness by the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Cohen

[176] • • • • Q. All right. Directing your attention or—strike that, and let me ask it to you this way, Mr. Eaton. When **[177]** did you first become aware that Krystyna Janowski had contacted representatives of the defendant and advised them that Mrs. Koller had not taken Bendectin during the first trimester of her pregnancy? A. I don't think I ever learned that. If I may explain, Mr. Cohen—

Q Oh, certainly, sir. A. (continuing)—When you asked the question, you said: When did I first learn that she had contacted the defendants and told them that.

Q. Yes. A. The first time that I read that was on the morning of the 28th, when I came to work. It was sometime prior to 9:19. • • • •

[180] • • • • A. • • • • But in this particular instance, what Mr. Butler called me about, as best as I might recall it, was to tell me that he thought that one of the secretaries had a post-partum psychosis. • • • •

[181] • • • • A. As best as I recall, he said—I do recall him specifically saying that Barnes was somehow involved. We were very familiar with that, and we were concerned about a possible breach of security because of their prior activities with respect to other witnesses in this case. • • • •

[196] • • • • A. • • • • Now, I later had learned—and it

is hard to separate what you learn in depositions later on from what you were told at a given time, but I believe I was told that a lawyer had been out there. • • • •

[201] • • • • A. Now, I do remember something else on the 27th. I had been told that this lady said that Mrs. Koller did not ingest Bendectin during her pregnancy, or during the first trimester. I don't remember which.

Q. All right. **[202]** A. And I do recall telling Butler at that time that that was absurd, or words to that effect. • • • •

FLOYD T. HUMPHRIES, JR., called as a witness by the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Cohen

[216] • • • • Q. Now, you indicated that one portion of the plan was to tape her, but preferably with her consent. Was that a correct understanding of your testimony? A. That was Mr. Allis' preference.

Q. Yes. A. And it would have been mine, circumstances willing.

Q. Was there some reason why you could not ask Krystyna Janowski for her consent? A. There was no reason why I couldn't have. Of course, I could have.

Q. Did you or Mr. Allis ask for her consent, when you went to her apartment?

Q. Did you advise her that she was being taped surreptitiously? • • • •

[217] • • • • MR. STEIN: That is like carrying a concealed gun openly, Your Honor.

THE COURT: Well, that is done in this country, but please go ahead.

Mr. Cohen: I withdraw the question.

Q. You never told her that she was being taped, sir?

A. No, sir.

Q. Now, was another part of the plan that was devised by Mr. Allis the preparation of a statement for Miss Janowski to sign. * * * *

[219] Q. And, having the statement in front of you, sir, would it be fair for me to state that one of the principal thrusts, or the principal purposes, and part of the plan in preparing this statement, was to get a retraction from Krystyna Janowski, if she had made any statement to representatives of Davis, Polk? A. Yes, it is. * * * *

[223] * * * * A. * * * * I cannot differentiate the contents among this call, conversations I had at the office, and subsequent conversations I have had with Richard Daum. They all seem to come together. **[224]** I can't pinpoint specifically what was said on each occasion, other than as generally as I have just said it now. * * * *

* * * * Q. Now, I would like to turn to an area entitled "Information about the Janowski incident from Nick Allis."

If you will turn to page 34 of your deposition—well, I think, to make sense, Mr. Humphries, we need to start at 33, at the bottom of the page.

"QUESTION: All right. Now, you and Mr. Allis went together out to Mrs. Janowski's apartment on the evening of the 27th; is that correct?

ANSWER: That's correct.

QUESTION: What had Mr. Allis told you about his prior conversations with Miss Janowski concerning Cynthia Koller's **[225]** conversation; what he told you?

ANSWER: Very little. I—he told me conversations from Richard Daum which he incorporated into what he knew. I did remember that it was Nick who knew all of this. Also, but between the two of them, it might have been partially Nick's knowledge that Krystyna had admitted to talking to members of the Davis, Polk, and Wardwell firm, an investigator saying that Mrs. Koller had not taken Bendectin during the first trimester of her pregnancy."

Was that question asked and answered, sir? A. Yes, it was.

Q. Was it true? A. That is my best recollection. * * * *

[226] * * * * Q. * * * * Do you know if the contents of this statement, Exhibit No. 3, which is now defendant's Exhibit No. 1, had previously been discussed with Miss Janowski?"

ANSWER: Yes.

QUESTION: How do you know that?

ANSWER: Well, Mr. Allis told me that he had discussed earlier that day the importance of getting the statement signed, reputing what she had apparently had allegedly said to someone at the office of Davis, Wardwell, and Polk [sic]. From Mr. Allis I understood and gathered, and was told, that **[227]** he had discussed this statement over the 'phone, and that was one of the purposes of his coming over later, which he had told her would happen."

Was that question asked, and was that answer given? A. The word is "repudiate" on line 20, counsel. It is a misprint. * * * *

A. That question was asked and answered. That is quite correct.

Q. And was it truthful when it was answered? Were you truthful when you answered it? A. Yes, I was truthful. * * * *

[227] * * * * Q. * * * * I am not sure I ever found out, Mr. Humphries, why you were unable to advise Miss Janowski that her conversation was being recorded. Did I ask you that?

THE COURT: No, you did not ask that precise question.

[228] MR. COHEN: Thank you, Your Honor. * * * *

Q. You indicated that that would have been preferable; that would have been your desire; that would have been Mr. Allis' desire. But, for some reason—and I don't recall whether you ever really gave me that reason—it was not done.

Can you share that with us? A. I would be delighted to, sure. When I say I would prefer to take a statement with the consent of the person questioned, that is always my preference.

Under the circumstances, I felt uncertain and very unclear as to the reaction that Krystyna Janowski might have.

I had not assessed and I had not determined in advance her readiness and her agreeability to have her statement taped.

I, further, felt that the subject matter was so critical and so sensitive and so much hung on it, in terms of the future of a very important and severely injured victim here, that, in order to be very certain that there would be no element of pressure or discomfort, hesitation, on the part of this witness, it would be best to tape this conversation without her—without her knowledge.

She was not told that it was not being taped, the conversation.

[229] • • • • Q. • • • • Now, do you recall Mr. Allis telling you: Well, Mr. Humphries, what I would really like you to do is to just walk on over here with me and listen to what she has to say and just evaluate it. Because I don't know if any of this has happened or not.

Do you recall him saying that to you? A. I think words to that effect. That sounds familiar.

Q. Well, do you recall? A. That is my recollection. • • • •

[234] • • • • Q. And Miss Janowski agreed to sign this statement, really, before he even pulled it out of his pocket; is that a fair statement? A. She agreed to sign such a statement.

Q. And then there was a colloquy between you and her and Nick where you said: Go on, pull it out, Nick. Pull it out. Did something like that happen? A. Yes, that's correct. • • • •

[235] • • • • Q. • • • • Is there any reason, as this plan was being designed and devised, as to why neither you nor Mr. Allis, nor anyone else at the Butler firm, talked to Carl Schuck? Can you give me any explanation? If you are trying to evaluate the veracity of Janowski, why wouldn't you talk to Carl Schuck? A. It was my understanding, speaking for myself, that she had not retained Carl Shuck at that time. She was not represented.

Q. Well, in addition to evaluation, weren't you and Mr. Allis still unsure of the truth of what was going on, and

weren't you still in the midst of an investigation and a search for the truth? A. Absolutely. • • • •

[237] • • • • Q. • • • • When she indicated that she would sign something and when you said, "Pull it out, Nick," and he pulled it out, did Miss Janowski say something like: "I have to cross something out to look like I did something"?

Do you recall those words? A. Yes, sir.

Q. What did they mean to you? A. It meant to me that Krystyna Janowski was very consciously and deliberately and agreeably assisting in the signing of this statement in such a fashion that it would have increased credibility as being her own.

Because when a statement is simply signed at the bottom, it carries less credibility than it might, were she to cross words out, correct them, make spelling corrections, and **[238]** so forth.

And she wanted to do this for that reason. • • • •

Q. And after she made that statement: "I have to cross something out to look like I did something," you said: "That's right. You understand. You understand."

What did you mean? A. I meant that she understood that this statement would be a stronger statement. That it would carry greater credibility as her own statement, were she to do this. And I was saying that I recognized that she understood this principle.

Q. Not necessarily more truthful, but more believable; is that what you mean by "credibility"? A. Well, I just mean the statement is a more valid kind of statement. You can use all of those words. They are all fine by me.

Q. Well, I am trying to find out what you mean. Do you mean that if you were to present this statement to **[239]** someone, the chances of them believing the contents would be enhanced, because it looks like Janowski had a hand in preparing it? A. She thought so, and I—

Q. You also did; did you not? A. (continuing)—also would agree, being an old statement-taker. Sure. • • • •

[240] • • • • Q. • • • • But were you aware at the time of having her sign—you and Allis having her sign the state-

ment, that it would be sent to a court? A. Well, not necessarily. I can tell you what my feeling was with respect to that, if you want me to add anything.

Q. Well, did you and Allis discuss the use to which you would put this letter? A. No, we didn't, not specifically.

Q. And you have indicated one of the purposes of the statement— A. Oh, may I—

Q. I am sorry. Sure. A. Yes, we did, and I will have to tell you what we did discuss.

Q. Certainly. Go ahead. A. I think I probably volunteered this myself in the conversation. The use that I envisioned for the statement was that of discouraging further harassment and badgering and annoyance, which she was complaining very bitterly about, **[241]** on the part of the investigator and the representative from the attorney's office.

I felt that if she had a copy of this, which we did leave her, and if she were to give this to Barnes, then this might dissuade him from any further activity of the kind she resented and was complaining about.

Q. So one of the purposes of this statement was to stop any investigators who were coming around and allegedly harassing her. Hopefully, she would show them this statement, and they would cease and desist? A. Exactly.

Q. All right. A. That was it, yes.

Q. And it wasn't necessarily packaged, that is, the contents weren't put together, with the thought that this is the whole, total story; it is what we want the world to know; and it is something we would present to a court of law.

That was not the purpose of that statement; was it, sir? A. Not so far as I knew, no. • • • •

[257] • • • • Q. I'm back in the home now, Mr. Humphries, on the 27th, when you were in Ms. Janowski's home.

Do you recall Mr. Allis promising Ms. Janowski that she could continue to work for the Butler firm? A. No, no promises.

Q. All right. Let me phrase it this way, in fairness to you, sir. Do you recall in the conversation at the home with Krystyna Janowski and Mr. Allis that it included an exchange

about Krys's employment relationship with the firm? A. Yes, sir.

Q. And did Mr. Allis suggest that if she wished, she could continue work at home, even though the baby might be there, in order for her to stay working and make money? A. Yes.

Q. The suggestion was made by Nick that tapes could be brought to the house. She said, "Well, I'll need a tape **[258]** recorder."

Do you recall that being said? A. Yes, sir.

Q. "And we"—meaning you and Allis and Janowski—"discussed the logistics of getting a typewriter into her house and her using it there"? A. Correct.

Q. To your knowledge, was a typewriter ever delivered to the Janowski residence, at least by you? A. Not to my knowledge. • • • •

Q. Did you have a discussion about what had just occurred with Mr. Allis? A. A brief one, yes.

Q. And what was that discussion, if you could share it with me? What did you discuss? A. Well, the gist of it was that we felt satisfied and rather content with the way the conversation went, and I remember what I said, that I felt that she was, that evening, rather believable, and I felt that we may well have, at that **[259]** time, done enough to discourage the defense represenatives from continuing their contacts with her, and that we had established the truth of what had actually gone on, or rather, what had not gone on between her and Mrs. Koller by way of a phone conversation. • • • •

Cross Examination By Mr. Stein

[260] • • • • Q. You knew that she was comfortable with you in the past; that is, there was some sort of respect and friendship between you two before you went over there, wasn't there? A. Yes.

Q. And how did that arise? A. From an occasional encounter in the Butler office when I was doing an odd assignment for Mr. Allis. I would need an address; I would need a file; and we would exchange briefly a little conversation, and I felt—apparently she did, too—that we were friends.

Q. And with that background, you evaluated her on the evening of December 27th. A. Yes.

Q. And when you left there, you were convinced that what she had told you and what was in the statement was true? A. That's correct.

Q. And you so told Mr. Allis, didn't you? A. Yes, sir. • • • •

[261] • • • • Q. Now, you intended to tape the whole conversation, did you not? A. I certainly did.

Q. You didn't premeditatedly turn off your tape recorder to conceal any of the conversation, did you? A. Not at all, no.

Q. How is it that you didn't get the whole conversation? A. When I went to the office Monday afternoon, the 27th of December, I didn't bring my own tape recorder with me. When Nick asked me if I had my tape recorder with me, I said no. Then he said, "Go out and buy one."

Having tested a couple in the office and found them inadequate and insufficient, I went out, after calling three or four places, to try to find a Sanyo machine. The one store where some Sanyo equipment was sold did not carry the hand-held small cassette tape recorder that would have been necessary for that evening's recording. I had to settle for a demonstration model of a J-500 Craig, carrying a mini-cassette. The only cassette tapes available were the ones with that machine. It was a demonstrater. They had a couple. I could have gotten more than the one, but I did not anticipate more than 40 minutes conversation. Certainly I knew that I wouldn't find justification for removing myself **[262]** from the room continuously. So, I had to settle for the 40-minute tape, 20 minutes on each side.

I couldn't find a half-an-hour tape or the kind of arrangement where I could have a two-speed and have a 30-minute or an hour on one side.

Q. Now, you went out and turned it over, correct? A. Correct.

Q. You come back inside and the tape recorder is in your pocket? A. Correct.

Q. Which pocket? A. This one right here (indicating).

Q. You are then afraid that the tape may expire and buzz; is that correct? A. That's correct.

Q. And what would have happened if the tape buzzed? A. It would have presented an embarrassing moment, because Krystyna Janowski would have heard it and might have wondered, and it might have alerted her to the fact that indeed I was recording the conversation.

Q. So, you're apprehensive that the tape may run and buzz? A. That's correct.

Q. What did you do in the face of that apprehension? A. Well, I had my eye on the clock, and a couple of **[263]** minutes before the 20-minute sector each time, I turned it off.

Q. Did Mr. Allis know when you turned it off? A. No. • • • •

• • • • Q. Why did you hedge your statement around with the words "might" and "partially"? A. Well, I didn't know whether it came from Nick or whether it came from Richard Daum, and I wasn't that sure of the completeness of what either might have said, or Nick in this instance, regarding this comment.

Q. Are you any more sure now? A. I'm sure that it might have been a gathering together of information that I have gotten since.

Now, right now I'm looking back. I remember more specifically that this point—and this point was made during Krystyna's deposition that I sat it on, the first part of it, anyway. • • • •

[264] • • • • Q. At the time you identified the signing on the tape—let me put it a different way. Can you identify on the transcript of the tape when Ms. Janowski signed the statement? A. Yes, I remember I did. I don't remember which page it was, but I remember I was able to do so when I was questioned in my deposition.

Q. There's nothing, as far as I can tell, at that point in the tape about any promises of any kind. Do you recall any

promises made to her in exchange for her signature? A. None whatsoever.

Q. Would you have participated in a statement where a promise was given? A. No sir.

Q. Why not? A. Because the statement, first, would be invalid, and, secondly, because it would be very unethical and harmful **[265]** to get a statement under those circumstances. • • • •

[266] • • • • Q. After you left Ms. Janowski's apartment on December 27th, and you felt that you had clarified something in a worthwhile way, would you have any reservations about giving that statement to someone and saying, "well, what's in this statement, it represents the truth as Ms. Janowski knows it"? A. I would have no such reservation at all. • • • •

[271] • • • • THE COURT: Okay. What was your evaluation of Ms. Janowski, since that's one of the primary purposes you were asked to go?

THE WITNESS: My evaluation was that she, that evening, was a woman relaxed, truthful, and interested very much in being rid and free of the whole question and being **[272]** able, once she got her pay check and her vacation pay, to leave the area with her daughter, go somewhere else and have nothing more to do with either firm, any investigator from any firm, or anyone connected with the questions that were being asked her that week.

THE COURT: Well, wasn't that a little inconsistent with her later wish or someone's later statement that she could work at home on Bixel Street?

THE WITNESS: No, I think not. I think that during the evening of our discussion, she was saying a lot of rather flamboyant and exaggerated things. She was talking about going to Mexico or going to Texas, and she also was—

THE COURT: Isn't that inconsistent with calmness?

THE WITNESS: With what?

THE COURT: Calmness, C-A-L-M-N-E-S-S.

THE WITNESS: It indicated a strong desire. With us she was perfectly calm. She raised her voice a couple of times. Basically she was settled, in complete control of herself, and laughing through a lot of it, chuckling and actually enjoying many parts of it. That tape will show it.

But the other thing you asked about was this inconsistent, her wanting to go away, with considering and talking about staying—

THE COURT: And going about the business of determining where typewriters may be set up and things like **[273]** that.

THE WITNESS: Right. I think not particularly, because she also was talking about her own—her own needs, and she was very concerned about her pay check and her vacation pay. She reiterated it a couple of times.

THE COURT: Let me ask you this. To your knowledge, was her pay check overdue?

THE WITNESS: No.

THE COURT: Well, do you know why she was concerned with it, if it wasn't overdue?

THE WITNESS: I think her concern probably was that she personally wouldn't be coming in to get it, and she was going to send her friend over, and she wanted to set up as clear and definite a means of this arrangement working out.

THE COURT: Where did you get that impression from? Was it something she stated that's in the transcript?

THE WITNESS: Yes, ma'am.

THE COURT: And what did she state that led you to believe she was not coming into the office any more?

THE WITNESS: No, no, not any more, but that Friday, I think she probably would be feeding her child and pay checks would be ready at the end of the afternoon, and Luis Castillo would be asked to come over and pick up the check. She was going to come in later, the next week, and show her **[274]** baby around. That's another thing she did say. • • • •

[276] • • • • THE COURT: But you also left there with the impression that she would continue on the payroll because a typewriter or other equipment would be brought to her house for her to work?

THE WITNESS: If it were to be brought, then she would be paid for that work. That was what I understood.

THE COURT: But did you understand that the typewriter or whatever the equipment was would indeed be brought to her house?

THE WITNESS: No.

THE COURT: Well, do you know why you went into all **[277]** of the discussion about where to set up such a typewriter if there wasn't a definite plan to take work to her at home?

THE WITNESS: Because everything was very much up in the air at that time. This was a proposal and a reassurance together that if she wished, she would be able to continue on working in this fashion.

THE COURT: Who made the proposal?

THE WITNESS: Nick Allis.

THE COURT: And this was after the statement was signed?

THE WITNESS: Yes, that's true.

THE COURT: And after the tape was off?

THE WITNESS: Yes, ma'am. • • • •

[280] • • • • THE WITNESS: My frame of mind was that she might well have said that she had had a conversaiton or that she might have—not that she had said it to Barnes and/or the attorney, but rather that she might have said so by telephone, which would have prompted, perhaps, the follow-up by the investigator in Los Angeles. • • • •

[282] • • • • THE COURT: Did you, Mr. Humphries—did you personally try to determine before she was asked to sign this "retraction" or "affirmation" the truth or falsity of whatever you were trying to get?

THE WITNESS: Yes, indeed. • • • •

[290] • • • • THE COURT: All right. And do you recall about what time of day that was on Monday?

THE WITNESS: It was in the afternoon. I'm not sure exactly what time of day. The reason I'm not sure of the time is I worked Sunday night 11 to 7, so I was sleeping during the day. So, he woke me up when he called, and I'm not sure—you know, when I'm—it's like being woke up in the middle of the night. You don't have a real clear time frame of things. • • • •

Excerpts from United States District Court for the District of Columbia Evidentiary Hearing Transcript of March 11, 1983

JAMES G. BUTLER, called as a witness by the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination By Mr. Cohen

[301] • • • • Q. When you called him back about 9:30 p.m., was it, on Sunday, what did he tell you? A. Well, it's hard for me to reconstruct everything that he told me. I've read memos and things of that sort. So, as best as I can remember, he told me basically that Krystyna had called him at the office on Sunday afternoon and told him a story about somebody approaching her in the parking lot of the hospital and urging her to call Davis Polk & Wardwell. And then she went on further to say that they wanted her to sign a statement that Mrs. Koller didn't take Bendectin during the first trimester.

As I recall, he also said something about Mr. Barnes and Mr. Ryan coming to call on her at home. And then there was some discussion about her seeing some independent counsel, and I was not clear, because I think that they mentioned or he mentioned the fact that maybe they were **[302]** talking about some criminal record of Krystyna's, and they talked about a defense lawyer, and I didn't understand whether they meant a lawyer for something involving some alleged criminal violation or what it was.

And then she mentioned something about the fact that they had plans for the office and knew where our computer was and—generally it sounded to me, whatever it was, and I think it's reflected in his memorandum that he subsequently prepared—generally I had the idea that it was a bizarre story. It didn't make sense to me. * * * *

[305] * * * * Q. And what did you say to Mr. Daum after he relayed this to you? A. Well, I said, "I think that she's flipped or that she's crazy." * * * *

[306] * * * * A. No. I thought that Krys was bizarre.

Q. You thought that she was bizarre even during the course of her employment with the Butler firm?

A. Correct.

[334] * * * * Q. You knew Carl Schuck's name? A. That's right.

Q. Did you know that he was an attorney, licensed to practice in the State of California? A. Yes.

Q. Did you know that he was with the firm of Overton, Lyman & Prince? A. Yes.

Q. Is that a reputable firm in the State of California and the City of Los Angeles? A. Yes.

Q. Is Carl Schuck a fellow of the American College of **[335]** Trial Lawyers, to your knowledge? A. I didn't know that at that point.

Q. All right. Is Carl Schuck, based on your knowledge of him on December 27, 1982, a reputable attorney in your city? A. Yes. * * * *

Q. * * * * Had you ever personally met Carl Schuck prior to December 27, 1982? A. In 1948 when I left Washington, D.C. after graduating from Georgetown, I had a letter of reference to Carl Schuck and had lunch with him before I got admitted to the bar in California.

Q. Is that the last personal contact you've ever had with Carl Schuck? A. That was the last personal contact.

Q. Does your firm and Carl Schuck's firm come into contact via an adversarial process of litigation? A. Frequently.

Q. So, you are very familiar with his name as a litigator; is that not correct? A. Well, it wasn't—no, I was not. Carl was

in an entirely different portion of the Overton firm than the portion I was dealing with. * * * *

[341] * * * * Q. What had led you to believe at this point in time that Janowski was not telling the truth? A. Well, because I believed utterly and sincerely in the veracity of Mrs. Koller and our litigation, and I knew that whatever she was doing was—seemed contrary to the basic belief that I had, that the malformations in this case were caused by the defendant's actions and that Mrs. Koller is telling the truth and that this is a responsible and important piece of litigation.

Q. So, you were aware at that time that Janowski had called Davis Polk and advised them that Mrs. Koller had not **[342]** taken Bendectin during the first trimester? A. At that point in time I was not aware of that fact.

Q. Well, your prior answer, and I may have misunderstood it, seemed to indicate that you were, but you're saying that was not a good inference to be drawn from that? A. The inference of what they were trying to do, according to Krystyna Janowski—you have to understand that I did not have any great faith in Krystyna Janowski's story, and yet here was an attempt or an apparent attempt to try to get a secretary in our office to sign a statement regarding the ingestion of Bendectin. And, so, based on my belief in Mrs. Koller's veracity, it seemed so bizarre and so unusual and yet I knew that the stakes were very, very large as far as the drug company was concerned, and I didn't know what they were capable of. * * * *

[365] * * * * Q. What did you say? A. Well, I tended to believe that she probably had called Davis, Polk. But I still couldn't put it in its direct context.

I think Nick wanted to believe Krystyna, and I tended not to believe her.

And yet, we didn't know for sure.

I know that he had told her to come to the office and to make a statement, and I know that she did not come to the office and make a statement.

Q. What would be the purpose of coming to the office and making a statement if you already had her statement to Daum, you already had her statement to Allis?

Why did she need to come into the office and repeat it for the third time? A. I wanted to see her verify. All we had so far was **[366]** conversation and talk.

I wanted her to verify whatever she was saying because I believed that she was a very dicey kind of a person.

Q. So the purpose that you and Allis discussed of a statement and her coming into the office was merely to set out the facts of what had occurred for your verification; is that correct? A. For the verification for whatever purpose in the future, because here was a situation that I had never faced before, and I don't think many other people have. And I wanted to get something in writing—what is this about? • • • •

[376] • • • • Q. • • • • Did you decide to do anything else after receiving that information from Mr. Allis? A. Yes.

Q. Could you share that, please? A. Well, I felt basically that Nick had to clear it up.

Q. What do you mean by clear it up? A. Nick had to handle the situation at this point.

Q. What do you mean by handle the situation? A. I thought that it was important that we get some statement in a form that could be used as to what had happened.

Q. Well, didn't you already know what had happened? A. I didn't know what had happened anymore than anybody else knew what had happened who wasn't there with Ms. Janowski.

Q. Would the statement have enabled you to know what had happened as you've described it, or would it not just be a written recapitulation of two oral statements? A. No.

I thought it was important to establish what was **[377]** the central issue during that day, as far as I could see, and that was, was this woman really saying that Mrs. Koller did not ingest her Bendectin at the time that she said she ingested it.

And I thought that that was the important fact, that the alleged activities of Barnes was to try to get her to sign a statement that she—she, Mrs. Koller—had stated that she had not ingested Bendectin.

And I thought it was very, very important, if this was what the thrust was about, to get a statement from Krystyna Janowski that that was incorrect or correct—whatever it was, that she had to sign a statement to that effect because that seemed to me to be the central issue of what was going on.

Q. So you weren't concerned about, in terms of priority, about the bribery or anything else.

Your primary concern, would it be fair for me to state, was the economic well-being of your litigation? A. Not at all. Not at all.

Q. You were concerned that you needed a statement from Janowski denying that Koller had said that she had not taken Bendectin in the first trimester; didn't you, sir? A. No.

I had to determine the facts of what Ms. Janowski was trying to say, and what she was trying to say was **[378]** evidently that Mrs. Koller had not taken Bendectin during the first trimester.

That was central to the investigation of what everything was about, about Mrs. Janowski being offered a bribe or a relocation, or all of that other stuff.

Q. Was your prime purpose in getting a statement—was to effectuate or to obtain a retraction or a refutation of any inference that Mrs. Kolier did not take Bendectin in the first trimester? A. No. • • • •

[393] • • • • Q. And everyone felt that the plan to find out the truth should be to consult with Miss Janowski a third time? A. It was to try to get something in writing to affirm what she was saying: that she had no such conversation.

Q. Well, I thought that the issue that you were trying to sort out was not whether she had any such conversation, but whether there was an attempted bribe, fraud on the court, and subornation of perjury, by the representatives of the defendant? A. We were trying to determine the correctness of the story that she was telling us: was part of it true? Was any part of it true? Was all of it true? What was the statement? What was it about? **[397]** • • • • A. I could be mistaken about the Rolodex card, but I am sure that I told him about

the fact that there was an attorney out to see Krystyna Janowski, and Krystyna Janowski identified him with the Davis, Polk firm, rather than being an independent lawyer.

Q. All right. • • • • **[398]** • • • • A. I don't recall that, but I just said that we thought it was appropriate to get a simple statement from her, whether the conversation had taken place or not.

Q. All right. A. Because I think, by that time, from some source, I had heard that it was supposed to have taken place the day that Mrs. Koller came into the office for the Falk appointment. • • • •

[400] • • • • A. Yes. Later in the afternoon I suggested that he go on out and see her.

Q. All right. A. And get a statement.

Q. And get a statement? A. Yes.

Q. And what did he say, if anything? A. He said he thought he should take a witness, and he suggested Richard Daum.

And I said: No, I don't think that Richard is constitutionally strong in order to handle the kind of confrontation which was involved. • • • •

[404] • • • • A. My recollection is that Allen Eaton called me from Washington, D. C., sometime around 6:00 o'clock in the morning and read to me a copy of the letter that he had in his office from Davis, Polk, and Wardwell. • • • •

[405] • • • • Q. Do you recall that the letter indicated that Davis, Polk had gotten a call from Miss Janowski— A. Yes.

Q. (continuing)—and she advised the defendants that Mrs. Koller had not taken Bendectin during the first trimester, or words to that effect? A. I think so. I would like to see the letter.

Q. All right. A. But I believe that that is what it said.

Q. All right. I am trying to get your recollection of it.

What I am trying to find out from you, sir, is this: Was this the first time that you were aware that Krystyna Janowski had called the defendants? A. Yes.

Q. So your statement—you had made no statements to anyone else, including your client, or to Mr. Eaton, that

Krystyna Janowski had called Davis, Polk and told them that Mrs. Koller did not take Bendectin in the first trimester, until you received that information in a letter from Davis, Polk on December 28th; is that correct? A. I believe that is correct. • • • •

[410] • • • • Q. What did you say to Mr. Allis? A. Well, I said—we went over the substance of the letter, and the first thing was that there was some statement that a receptionist had taken a 'phone call from someone who identified herself as the secretary to Mr. Allis, and, of course, that could only have been Krystyna Janowski.

So we tried to put that in the context of the things that had happened the day before and— • • • •

Q. • • • • I am not sure I understand what you mean you were trying to put into place. A. Well, because there was no verification, and we had no knowledge up to this point that Krystyna had called the New York office on December 22, 1982. That was not information that we had up to that point. • • • •

[416] • • • • Q. • • • • On Monday, when you were trying to get to the bottom of it, you had his name involved in bribery and fraud.

On Tuesday, you, all of a sudden, because of this letter, seek him out. It was Tuesday, was it not, sir, when you called? A. It was Tuesday, but I did not have Mr. Schuck **[417]** involved with bribery and fraud.

Q. Correct me if I am wrong, sir. You were trying to get to the bottom of what was occurring in the Janowski matter on Sunday evening, the 26th, 1982; on Monday morning, the 27th, 1982; on Monday afternoon, the 27th, 1982, in December; and on Monday evening, December 27th, 1982; is that not correct? A. That's correct.

Q. All right.

And, in doing that, you talked to Janowski, you, personally, once on the 'phone; Allis, once on the 'phone.

You went to see Janowski, or Allis did, once at the hospital. He went to her home with Humphries.

All of that, that evening with one person; is that not correct, Mr. Butler? A. With one purpose? No.

Q. With one person, Janowski. A. Yes, but Janowski was still our employee.

Q. I see.

But at no time—at no time while you were doing this, ostensibly to get to the bottom, did you call another person, who, you believed, was not involved in this, to find out how it was that their name was associated with your employee. You did not do that? A. Yes, but our employee had told us that she was **[418]** not represented by Mr. Schuck.

Q. I am not talking about representation now, sir. I am talking about getting to the bottom, as you keep saying.

A. Well, I thought the first place to go was to Krystyna Janowski; not to Mr. Schuck. • • • • Q. • • • • **[419]** • • • • Were you trying to get to the bottom of whether there were fraud and bribery being committed, or were you trying to get to the bottom of whether Koller did or did not take Bendectin?

What was it that you were going to get to the bottom of? A. I did not see that they were inapposite. I felt that what I had to do was to find out what Krystyna Janowski really was saying, and I thought the best way to do that was to take Mr. Allis, a man whom she respected, if not had a more than high regard for, and have him talk to her and tell her to tell the truth, whatever the truth might be, wherever it might lead, and to try to get that in a form that someone would be ready to accept.

I, also, felt that if I had called the court, or somebody else, and tried to make some representations as to what Krystyna Janowski's statement was, that I would be acting recklessly and without due regard for all of the people who were involved.

Q. All right.

And you felt like that on the evening of the 27th? A. That is correct. • • • •

[434] • • • • A. • • • • I think I had a duty to notify the court if I thought that Krystyna Janowski had called them. But

whether it was grossly improper not to have done so, I don't know. • • • •

A. Well, it is—I think what I was asking was for the court to have a full investigation into the circumstances.

I think that I acted fairly and judiciously and honestly with the court, and I don't—and I don't know whether it would have been grossly improper to have not notified the court, if I knew it.

But I never did know it. I did not know it. • • • •

[437] • • • •? A. Well, I was of two states of mind on Monday. I didn't know what to believe. I didn't know what to believe.

And so I was just simply reciting this. Mr. Allis tended to believe Krystyna Janowski was telling the truth, and that all of these things were true.

I, perhaps, was more cynical than Mr. Allis, but I just simply wanted to recite the facts and try to dig into it and figure out what was the proper thing to do.

Q. Well, my question to you, sir, was: • • • •

[439] • • • • Q. • • • • And all I am saying is that the information that Daum gave you, all of it was not included in this paragraph? A. I don't want to argue with you, but I had a page and a quarter of a letter from Davis, Polk. And I didn't think that this was a pleading. I thought it was trying to set forth fairly what I knew as of that period of time, without going into exquisite detail.

I asked for a hearing to advise your honor of the complete circumstances as to what has occurred, and the facts as we understand them.

I was not trying to set forth in detail everything that took place. • • • •

[446] • • • • Q. • • • • Obviously, if you had knowledge that she had called them, then it would have been an entirely different situation and you would not have objected like this, I assume? A. Oh, I think that until the thing was sorted out, they should not have approached my employee. She was still my employee.

Q. So even if you had knowledge that she had contacted them, you don't think that they should have done anything about that contact? A. Absolutely not. I think it was improper for them to do so.

Q. But you are testifying that you never gained that knowledge until December 28th? A. That is right.

Q. When the letter of December 27th arrived? A. That's right.

Q. Did anyone in your organization have that knowledge sir, to your knowledge? A. Have the knowledge? No.

• • • •

Cross Examination By Mr. Stein

[454] • • • • Q. You said at one point that you were of two states of mind, and you said: "I was more cynical."

What were your two states of mind, with respect to **[455]** the information that you had been given by these various people concerning Miss Janowski? A. Well, we had this story.

Q. What was the story, as you understood it? A. Well, the story about the mysterious stranger and the story about Barnes coming to call on her and the story to relocate her and the story of her wanting to sign a statement—of them wanting her to sign a statement saying that Mrs. Koller did not take Bendectin during that period of time.

And, on the other side of it, I had kind of an underlying disbelief in her, because I knew that she had this kind of affection for Mr. Allis. And I just didn't know whether what she was saying was true, or the opposite was true.

Q. What would be the opposite? A. The opposite would be that all of this didn't happen exactly this way, and that maybe she had signed some kind of a statement that Mrs. Koller had told her that she did not take Bendectin.

Q. What would be the basis for drawing that conclusion? A. I guess the underlying—my lack of confidence in Krystyna Janowski.

Q. Why would that have led to the conclusion that you just identified? A. Well, there was the possibility that maybe she

[455/A] had signed such a statement. I didn't know. And I just did not trust Krystyna Janowski, basically.

Q. Did you believe that people would come out to her house, without any initiation by her, to solicit a statement from her? Did you believe that? A. I thought it was highly unlikely.

Q. Did you express that view? A. I expressed it to Mr. Allis and I expressed it to others.

Q. Why did you think it was highly unlikely? A. Well, it was just that in 35 years of practice, I had never seen such a thing or heard of such a thing.

Q. Did you give your reasons why you thought it was unlikely to Mr. Allis? A. I think I did. It was very hard to talk to Mr. Allis. He felt very, very affronted, very distrubed, by what had happened. And I think that he wanted to believe Krystyna's story.

And so, being my partner, I wanted to give him full expression of what was being said and what was being done.

And when he came back from seeing her, I think that he was more convinced of what she was saying than I was.

Q. If what she was saying were true, as I have been able to gather it in this proceeding, if what she was saying were true, it would be that people from Davis, Polk, **[455/B]** or people connected with them, or people connected with their client, had come to her and asked her to sign a statement that Mrs. Koller did not ingest Bendectin. Is that what you understood her story was? A. That is what I understood to be the whole thrust of what was happening.

Q. A cynical reaction to that, I take it, would be that, as a matter of fact, she had done precisely what she said that she had not done: that is, that she had told them that Mrs. Koller had not ingested Bendectin? A. That is correct, and that thought certainly crossed my mind.

Q. Did you present that point of view in discussions with your partners? A. I am positive that I did. • • • •

Excerpts from United States District Court for the District of Columbia Evidentiary Hearing Transcript of March 14, 1983

JAMES G. BUTLER, called as a witness by the Defendant, having been first duly sworn, was examined and testified as follows:

[524] • • • • THE COURT: But now you have testified here during this proceeding that on the 27th, you thought she was suffering from postpartum blues; you thought she was crazy; **[525]** you've told me today you thought she had deep psychological problems; you've also told me today that you thought she was an explosive personality before December 27th; isn't that correct?

THE WITNESS: Those were considerations I gave, Your Honor, yes.

THE COURT: Now, given the condition you believe Ms. Janowski was in, how could you in good faith have permitted Mr. Allis to take a statement out there that says, "Today I feel calm and my mind is free and clear"?

THE WITNESS: Because that's what Mr. Allis said that she said and how she was in the afternoon when he talked to her—that morning at 10 o'clock.

THE COURT: That she said that her mind was free and clear?

THE WITNESS: She said that she was clear and she appeared clear at that particular period of time.

THE COURT: And you were willing to have her sign that statement, notwithstanding your concerns about her being crazy, her suffering from postpartum blues, and the deep psychological problems that she had, and the fact that she might have been pathological?

THE WITNESS: All I wanted her to do was to sign a statement which accurately reflected the truth as she knew it. That's all we wanted to do, and that is the truth, Your **[526]** Honor. That is the truth in that statement.

THE COURT: Why would you fear a confrontation if you felt that her mind was free and clear and that she was calm on the 27th?

THE WITNESS: Your Honor, I think you're taking words out of context.

THE COURT: I don't think so, Mr. Butler. I listened to your testimony with great care.

THE WITNESS: I can understand that, Your Honor, but I—I felt that when Mr. Allis and Mr. Humphries were going to go out there, they were going to confirm the things that she had already told Richard Daum and she had already told Mr. Allis, period. • • • •

[529] • • • • THE WITNESS: Well, I felt absolutely that there wans't any possible chance of Mrs. Koller ever having said to her that she didn't take Bendectin during the first trimester, because that was completely contrary to the medical records as I know them, that there was—

THE COURT: Well, contrary to the medical records. Who says the medical records are true, all right? • • • • **[540]** THE COURT: Well, induced or otherwise, the question is, had she made a call to Davis Polk, you were fully aware of that?

THE WITNESS: Again, Your Honor, what is knowledge? I did not know that she had made a phone call, but did I suspect it, absolutely I suspected it.

THE COURT: Well, you suspected it on the 27th, according to your earlier testimony.

THE WITNESS: I suspected that there was a possibility, yes, Your Honor. • • • •

Redirect Examination By Mr. Cohen

[557] • • • • Q. Well, the query is, sir, though, that you attached that statement in a letter to the Court and you did then mention the $15,000 bribe in your letter; is that not correct? A. I mentioned that we also have learned that she stated—meaning Krystyna Janowski—that she had been offered $15,000 to sign such a statement. That's what I told the Court. I didn't—I said only that, and that's all we knew about it.

Q. And I'll leave this issue alone. I don't mean to badger you, Mr. Butler.

The only point I'm making is that on the 28th when you told that to the Court, you had no additional knowledge than existed—than you had on the 27th when the Janowski statement was taken? A. Nothing more additional that I know of. • • • •

[593] • • • • Q. Now, if I can direct your attention to page 3 of Defendant's Exhibit 13— A. Yes.

Q. (continuing)—which is entitled "Third Contact," do you have that point there, sir? A. Yes.

Q. All right. And it reads:

"Barnes and Ryan offered to send an attorney to her on Friday at 8:00 or 9:00 o'clock. A man with gray hair, over six-feet tall, broad shoulders, 60 to 65 years old, and wearing a gray suit, arrived at her apartment, as stated. He was uncomfortable that Luis was there and didn't want to talk. He identified himself as Carl Schuck of Overton, Lyman, and Prince. He told her not to be afraid of Jim Butler. Carl knew Jim from the Paris **[594]** air-crash litigation. He stated he did not want to do what he was doing. He felt it was unethical, but had a favor to repay. He saw his role as just giving some counsel. Apparently, he read from the evidence code.

"Krys and Carl agreed to meet at his office at 10:30 a.m., Tuesday, December 28, 1982.

"He wrote his name and address and appointment time on a card. We have this. As he left the apartment, he found a business card and returned to give that to Krys. We have this."

Now, did I read that accurately, sir? A. Yes.

Q. And is that a true statement of what Miss Janowski related to you? A. Yes, that is my impression of what she related to me. • • • •

[636] Q. • • • • Who gave you the statement to look at? A. I don't recall that anybody gave it to me. I recall somebody walking by with it, and I kind of took it to look at it.

Q. Was it being generally passed around the firm for people to look at and comment upon, if they so desired?

A. No.

Q. All right.

THE COURT: Since nobody gave it to you, from whom did you take it?

THE WITNESS: I don't recall. If you—

THE COURT: There are only—

THE WITNESS: If You—

THE COURT: Excuse me. There are only "x" **[637]** number of employees at the Butler firm.

THE WITNESS: Yes.

THE COURT: You say you took it from somebody in the lobby. Now, by a process of elimination, tell me from whom you took it.

THE WITNESS: That doesn't mean that I recall who I took it from.

THE COURT: I can't believe that you don't recall from whom you took it. There are only 10 or 15 employees in the Butler firm. This isn't like Times Square. This isn't Times Square we are dealing with.

You know every employee at the Butler firm; you take a document from somebody's hands to read; and you can't recall three months later from whom you took the document?

THE WITNESS: That's correct.

THE COURT: Very well. He can't recall. • • • •

Excerpts from United States District Court for the District of Columbia Evidentiary Hearing Transcript of March 15, 1983

NICHOLAS R. ALLIS, called as a witness by the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Cohen

[758] • • • • Q. Mr. Allis, did Ms. Janowski ever give you a business card of Carl Schuck's? A. I think she did, yes.

Q. Can you tell us when she gave that to you? A. I think that she gave it—assuming she gave it to me, and, as I said, I think she did, it was in the hospital. • • • •

[770] * * * * A. I don't recall, but the previous afternoon, in **[771]** discussing the possibilities, one possibility or even a probability was that she had at some point in time led Barnes or the defendants on by saying something. This could have been in a telephone conversation or at some other time. She had in the hospital—by the time I left the hospital, I thought that she had made a telephone call after initially being contacted by Barnes and his—the people with him, but she always specifically denied—and I hope I don't have to keep repeating this—specifically denied that she said anything to the other side about Mrs. Koller not taking Bendectin at any time or any other such thing.

Q. My question to you, sir, was two-fold. On the 27th, did Janowski tell you that she had called Davis Polk & Wardwell after they had made an initial contact with her? A. She said that to us in the evening, to the best of my recollection, and this—that's correct.

Q. And the further question is, on December 28th in the morning when you were reporting to Butler, did you tell him that? A. I do not recall, because it would not have been particularly important information, because by the afternoon of the day before, before going to her apartment, we had already thought that there was a possibility, or even a probability, that she had contacted the defendant and led them on—and, in addition, led them on in some way, and **[772]** that's why I mentioned to you what was my belief about the telephone call by the time I left the hospital.

So, the fact that she told us that that evening would not have been particularly important information just confirming—confirming a fact. She called Davis Polk after being contacted by the other side, and I don't really recall just exactly when she said that, but I'm pretty sure she did tell us that again.

Q. On the 27th? A. At her apartment.

Q. Yes, and that was the 27th. A. It was the 27th in the evening, yes.

Q. Now, you didn't feel that the confirmation of a suspicion that you had was important information? Is that your

testimony? A. Well, I suppose everything that she said on Tuesday—on Monday evening was important, but as far as what's most important, the important things were that she said that they were trying to get her to sign a false statement and that they had offered her things for this, and that this false statement contained information to the effect that Mrs. Koller said she didn't take Bendectin or didn't take it during a certain time period or when she said she did, and that this was false. That was the important information, the very important information. And the things **[773]** after that, of course, they're all important, but it's a matter of scale, relative importance.

* * * *

[781] * * * * Q. Mr. Allis, upon Ms. Janowski telling you that information or confirming the belief and advising you that she had called Davis Polk, did you make any attempt to change the statement that you were asking her to sign? A. No. It should be reiterated that she said that she called Davis Polk after being initially contacted by defendant. She may have told us that after—you know, at the very end. It certainly is not significant to me, considering her recitation of it that it came after and that she denied—always denied—telling Davis Polk that Mrs. Koller hadn't taken Bendectin or anything of that sort. So— * * * *

[782] * * * * Q. Now, at the time you and Mr. Humphries arrived at Ms. Janowski's on the evening of the 27th, Exhibit 2 had already been prepared by Ms. Janowski, with the exception of the last four lines on the exhibit that state, "The above conversation is the only one they want me to recall having"; is that correct? A. "Is the one." There's no "only" there.

Q. "Is the one they want me to recall having."

Is that correct, that that wasn't on there at the time you arrived at the house? A. That's right.

Q. Now, who suggested that that be added, sir? A. Well, I think I suggested that she indicate on the piece of paper somewhere what it was. She chose this wording. I never suggested the wording at all. I just suggested, **[783]** "You've given me a piece of paper. Perhaps it would be a good idea to indicate somewhere on this piece of paper exactly what it is."

So, she thought for a moment and drew a line and wrote, "The above 'conversation' is the one they want me to 'recall' having."

Q. Did you ask her to explain who "they" were, or was that satisfactory in terms of your request that she indicate what this was? A. This goes with the statement that she signed, and it's very clear on the statement that the "they" are George Barnes and Associates. * * * *

[784] * * * *

THE COURT: Please do. Thank you.

I am going to focus now on the second sentence in that statement: "Today I feel calm and my mind is free and clear."

Why did you add that sentence to this statement?

THE WITNESS: I did not want her signing a statement if she felt completely unbalanced and unable to think **[785]** clearly. I put it in there because that was my impression of her at the hospital. That's why I wrote that. In fact, I was amazed at how on top of things and almost excited about the whole affair she seemed to be.

It seemed to me, she seemed to be almost inappropriately calm and descriptive—descriptive about all of the events that were happening to her.

So, I felt that she was calm and her mind was free and clear, but if her mind was not calm and her mind was not free and clear, I certainly would have wanted her to indicate it, and I put it in there so that she could look at it and see if this was something that she wanted to sign.

When she went through this correcting it, she crossed out one word in the statement, the word "feeling". She underlined the word "great", and I assume that if she wasn't feeling calm and her mind was not free and clear, she would have likewise felt very much at ease in crossing that line out.

THE COURT: Let's look at the sentence following where you said she underlined "great". That sentence also reads: "At the present time, my mind is free and clear and everything in this statement is true and correct."

Why the repetition of "my mind is free and clear"?

THE WITNESS: Because this was a very hurried statement. I think I even dictated this standing up, into my **[786]** machine. This was a very simple, hurried statement, only containing the bottom line things that she told me in the hospital, and I thought it was important to have in there what her mental state was, and I probably forgot that I had already said it by the time I got down to dictating that sentence that you've just indicated. I just said it over again.

If I'd gotten that statement and gone over it and drafted it and so forth, I wouldn't have put it in, because it's a repetition.

THE COURT: Did you testify earlier in this hearing that you found Ms. Janowski to be somewhat unbalanced and somewhat hostile in the hospital?

THE WITNESS: No, I did not testify to that. At the hospital, she said that she had some hostilities towards the law firm. She didn't say, "I have hostilities towards the law firm," but she indicated that and said specifically that she was upset or angry about the parking, and she told me about that problem, that her parking had been taken away from her in the fall, something I didn't know.

She also told me one other anger or hostility she had towards the firm. I think it was the raise business or else it was the vacation, that she had gone in to Michael Dan the week before and asked for her vacation—to be able to take a vacation earlier, and according to her, he had said, **[787]** don't take it until after this Koller case starts, and that kind of thing.

As far as her being unbalanced, I didn't say that she was unbalanced at the hospital. In fact, as I say, I was—it seemed to me that she was inappropriately relaxed and almost enjoying the situation.

In the affidavit I filled out within two days of that hospital visit, I said—and I remember it because it just struck me so odd—she said once or twice that this is like—"Gee, this is like a James Bond mystery figuring out what happened here."

THE COURT: And if I am hearing you correctly now, what you're saying to me is that if anything, her behavior at the hospital appeared inappropriate rather than appropriate?

THE WITNESS: She seemed very relaxed at the hospital and very chatty. In my mind, it seemed a little inappropriate for her to be so relaxed and so chatty, in view of this horrible series of events she was describing to me, that they were out day and night bribing and threatening her and so forth and so on.

But I assumed—I thought, here's a very strong woman, just the way I always thought, a diamond in the rough, up from the slums of Chicago, able to just get on top of everything.

THE COURT: Let me ask you, Mr. Allis, you spent close to 50 minutes at her home that night on the 27th, **[788]** evening, night, whatever the case may be. Would you consider that any of her behavior while you were there may have been flamboyant or any of her statements exaggerated, that she might have been anything other than calm, clear in mind?

THE WITNESS: Yes. She talks—she tends to use flamboyant—a flamboyant method of talking, but that's not unusual and did not mean to me that her mind was not free and clear.

The only thing I can say about the flamboyant conversation is what would be in the transcript. If I was directed to look at the transcript now, I could pick out the type of words that I mean to refer to her way of talking. But it wasn't anything unusual.

Again, she was very friendly, very chatty, on top of everything.

THE COURT: Did you note any statements that you might have deemed exaggerated?

THE WITNESS: I can't recall, but if you want me to look at the transcript, I would be glad to.

THE COURT: Your recall is enough.

Now, the way I understand your testimony, not the testimony in the case but your testimony, and that's what I'm trying to get at, all day on the 27th prior to arriving at her home, you had no reason to know that she had talked to Davis Polk; is that correct?

[789] THE WITNESS: That is not correct.

THE COURT: All right. Then tell me—you did have reason to know it?

THE WITNESS: Your Honor, I prefer just to tell you what I knew that would be relevant to that. May I?

THE COURT: If you can just answer my question, then I can proceed with the next part of my question.

THE WITNESS: A distinct possibility, perhaps even a probability, in my mind logically, which I had logically developed by the end of the afternoon, based on her statements to me at the hospital, was that she had made a telephone call to Davis Polk at some point in time.

Now, she said—she always said that this telephone call was after she was initially contacted, and my understanding was, in other words, they had threatened her or offered her things, and then she had made some sort of a telephone call.

Now, she denied, always denied, saying anything in a telephone call or any other place—she denied that she had said anything to them about the case—about Mrs. Koller not taking Bendectin or anything else that would reflect anything of that sort, you know, a fraudulent nature of the case. She denied it.

Now, by the afternoon, I thought, perhaps she said something like that under a strain or under hostility, then **[790]** her guilty conscience got to her after a few days, and she contacted our firm voluntarily, and she has embellished the thing a little bit, trying to make herself out to be a little more of a victim than she is. This is what I thought.

Perhaps she had said something to lead them on, because, otherwise it would not make any sense for a firm such as this—the opposing law firm and their investigator,

Barnes, to be out at her house day and night as she described it. That's what she was telling me, that they were out there offering her things, bribing her.

Now, why would a firm do that? We wouldn't do it to a secretary of Davis Polk. Why would they do it to my secretary? And this is the confusing part to me about what was happening.

So, I thought that there was a distinct possibility, perhaps even a probability, that at some point along the way she had told them something of that nature.

But I want to reiterate, Your Honor, that in my mind, it would have been a lie that she told them to lead them on. It wouldn't have been the truth. It would have been just something she said because she was hostile, or mentally unbalanced, or whatever the reason, that she had told a little white lie to kick us in the pants for some reason. And then they came out to her and she got very upset about the whole thing. "This is blown way out of proportion," **[791]** she's thinking to herself. "I'd better set the record straight. I'll call up the firm and tell them what I did." And then when she did call us up, she was too embarrassed to admit what she had done. But what she had done was not tell them the truth. It was to tell them a little white lie to get back at us in some way for some imagined wrong.

THE COURT: Well, let me ask you, Mr. Allis, would I be incorrect in saying that what you are saying is that you surmised that there had been a call, but you had no evidence of a call; is that correct?

THE WITNESS: Your Honor, it's very important to separate out the call and what was said in the call.

THE COURT: Well, no, you see, I'm not concerned about the content of the call. I'm not at all concerned about the content of any call.

THE WITNESS: Okay.

THE COURT: My initial question to you on this was whether or not you knew on December 27th, prior to

going to her home—prior to going to her home—whether or not you had any reasonable grounds to believe—

THE WITNESS: I did.

THE COURT: —and your reasonable grounds to believe, you say, are the circumstances surrounding her contact with your firm and the circumstances that she told you about?

[792] • • • • THE WITNESS: There's three parts to it: Did she make a telephone call? If so, what did she say? If she made a telephone call, when was it? Did she initiate the conversation?

Those three things are very important. Now, at the hospital, she led me to believe that she'd made a telephone call. Today sitting here, I can't recollect her saying, "I made a phone call." But in an affidavit which I wrote out within two days of it, I stated that she stated to me that she had made a telephone call after being contacted by Barnes and threatened and bribed, and she denied, always denied, saying anything in the telephone call.

I do specifically recall, even sitting here today two months later, because it was so odd, the way it was **[793]** brought up by her. It was initially brought up as a conditional kind of statement: "Well, Nick, what if I did or what if somebody did make a telephone call to Davis Polk?" and that specific question, I followed it right up: "Well, did you?" Answer: "No".

Now, we talked on for another hour. She may well have said during that hour—admitted somewhere along the line that she had made a telephone call. But the fact that she had made a telephone call wasn't particularly significant to me. Why? The reason it wasn't is she had denied any importance in any such telephone call. I didn't know whether she was saying, "They wanted me"—this is what she said—and even as I'm talking now, it's kind of coming back to me. When we were getting up to go that evening, Humphries—she said she'd made a phone call after—oh, I know what it was. She said that she had been contacted by some—pressured, whatever, threatened,

promised things to make a phone call, and it would be very lucrative to make a phone call, and all they wanted her to make a phone call for was so that they would have it on the record, for example, on their telephone record that she had made a phone call to them. Then they could say that they hadn't gone out and got her, that she had actually made a phone call to them, and not that she said anything in the phone call, but simply that she would dial the number and it would ring and somebody would answer. And **[794]** then if they went out and got a telephone record from the pay phone or at the hospital, wherever it was, or from our office, there would be a record there that she had made a telephone call.

So, it's very important what I thought about the content of the telephone call. She denied saying anything in that telephone call.

So, it wasn't that—I didn't know exactly where that fit in.

And then the other thing that was important about the phone call is she said that she had not initiated it. So then I get this information. I leave the hospital knowing—in Your Honor's words, having a reasonable belief that she made a phone call, but also leaving the hospital with her statements to me that she had not said anything in any phone call, or any other time to them, and lastly, that she had not initiated this contact; this contact was initiated by Davis Polk or by—I keep—it's Barnes that initiated the contact.

THE COURT: Well, that's all right.

THE WITNESS: So then I go back and say, "Is that—what is going on here?" So, the phone call, even though I had a reasonable belief that she made a phone call, when I came to my opinion that there was at least a distinct possibility, maybe even a probability, that she had said **[795]** something at some point in time that afternoon to lead them on, I wasn't even thinking that it was in a phone call. It might have been in one of these discussions that she had with Barnes when Barnes was at her house 24 hours a day, something of that sort.

Does that make it any clearer?

THE COURT: Well, I certainly do understand what you are doing, but, you see, I am concerned about whether you just surmised or whether you had evidence that she had made the telephone call.

THE WITNESS: And had said the case was fraudulent?

THE COURT: No, no, no. Just—

THE WITNESS: I certainly had evidence that she had made a phone call, yes. • • • •

[798] • • • • THE COURT: You interpret things differently. But did Mrs. Janowski at that time, whether truthfully or not, admit or acknowledge **[799]** having made a telephone call to Davis Polk?

THE WITNESS: To the best of my recollection, she did admit that.

Now, I don't remember if that was after we got finished the statement and her giving this. I thought—we had never really gone back and gotten on 10 o'clock Wednesday what happened, on 9 o'clock Thursday what happened. We'd never gotten anything like that, because of our efforts to make her feel comfortable, or my efforts in the hospital and Mr. Humphries' at her house.

So, I always wanted—and that's why I said it in the tape about I'd rather have a longer, more detailed statement. I always wanted at some point in time to get a detailed recitation day-by-day and hour-by-hour if possible, but Floyd wanted to go. But standing up, we did have a little conversation. I don't recall when she said that business about the telephone call, but to the best of my recollection she did say it.

But, again, she said it—yes, she said that she had been promised that it would be lucrative for her to make a telephone call. That's when I said—this is when that occurred which I mentioned before, to the best of my recollection, this business about her saying that they just wanted her to get it on the record that she'd made a telephone call to Davis Polk, and that way they could cover themselves **[800]** and talk to her. This is the way I

interpreted it. What I'm giving you is a combination of what she told us and how I interpreted it. She said that she was told it would be very lucrative for her to make a telephone call to Davis Polk. That's what she was told by their people or by Barnes or by a third person, something which I interpreted to be Barnes.

So that she had made that just to see what would happen. Again, not that she said anything about the case being fraudulent or Mrs. Koller not taking Bendectin in such a call but only that there would be something on the record.

So, the telephone call and, yes, I thought that she had made a telephone call, because she told us at the end of the conversation, but the telephone call was of no more importance to me than the conversation she had with Barnes during the 24 hours a day that he was out there. She always denied saying anything to lead him on, but I figured that perhaps in some way she might have or had. • • • •

[801] • • • • THE COURT: May I go now to that sentence in which "great" was underlined, and that sentence reads, "any conversation I had with George Barnes, Patrick Ryan or any other person from Davis Polk & Wardwell, or George Barnes and Associates, was at a time when I was extremely upset and under great emotional stress."

What is your basis for that sentence, since you wrote that sentence?

THE WITNESS: She said that George Barnes, and she also mentioned these other people, but to my recollection George Barnes was always the chief culprit—I'm talking about at the hospital when I talked with her—she said that **[802]** these people had been out at her house constantly trying to get her to sign a statement, offering her things and threatening her. So, I knew that she had had conversations with these people. They were out at her house all the time and they were apparently talking to her. So, I knew that she had conversations.

I thought that maybe she must have—I thought that she must have said something to lead them on in some way, or else why would they be spending all this money and sending all of these people out to surround her like vultures, unless she in some way had said something to lead them on.

But she specifically denied saying anything. But because I thought that she might have said something to lead them on—I wouldn't know whether it was an offhand comment or something more direct, I said—I put in there that "any conversation," because I didn't know what conversation she had had. She denied saying anything that would be unfavorable to the Koller case.

Furthermore, not only did I not know what this, what I assumed, comment or lead-on had been to anybody, I didn't know who it had been to. So, I had to include all of the different names.

And as she described it, she was being threatened; she was being offered things; they were out there 24 hours a **[803]** day. She wanted to flee to Mexico. She couldn't stand it any longer. So, I thought that she must have been—she was describing to me a situation where they had come out to her and got her at a time when she was upset and under emotional stress and increased her being upset and increased her being under emotional stress.

Added to that, I specifically recall her—and several people mentioned it to me—at the Christmas party we had, which, now in retrospect, was the day before or two days before she made these phone calls, that she was very much out of sorts, very angry looking, very depressed looking. And then added to that, by the time I got there in the evening, looking back on it, I talked to Mr. Butler, he thought that it was postpartum blues and being very depressed about her infant.

And I should emphasize—I don't know if I mentioned this—but she had told me that the doctor told her she was never going to be able to have another baby after this one, and that because this baby was so premature, it might

have some sort of damage, and she had just had the baby.

So, in my mind she was describing to me a situation where she was upset and under emotional stress when she had been—during the time that she had been talking to these people the last week and up until she contacted us, and I **[804]** must say I thought definitely that, when she crossed out the word "feeling."

"When I was feeling extremely upset," she crossed out the word "feeling" so it reads, "When I was extremely upset." To me, crossing out the word "feeling" made it that much more powerful. She's saying, "I was extremely upset." And then she underlined that word "great." So, another thought I had was maybe she said something to them, and because she was under the emotional stress or feeling extremely upset, had the hostilities towards our firm, whatever, that she doesn't even know what she said. That was a possibility that I thought. She doesn't even know what she said to them, completely unconscious of it.

THE COURT: Would I be correct then, based upon what you have said, in my view that this was your perception of her and she later adopted it when you presented her this statement?

THE WITNESS: No. It was my perception and my interpretation of what she told me about her mental state when she was at the hospital, combined with what I knew to be her mental state from the week before when we had last seen her. And I suppose—and in addition to that was my own presumptions and assumptions based on what the kind of events that she was describing would do to anybody. I'm sure that any average person would be somewhat upset if somebody came **[805]** out and threatened them and bribed them the way she said. • • • •

[809] • • • • THE COURT: Now, the first paragraph of that letter states that — and specifically the last sentence thereof states that "The message as relayed was that she refused to work on the case because it is fraudulent."

Now, that is the first time, I presume, that that information came to your attention; is that correct?

THE WITNESS: To the best of my recollection, although I understand that Allen Eaton called up Mr. Butler at about 6 o'clock or 6:30 or something our time in the morning, and he may have relayed that information, and it is possible that I was told before the letter actually was delivered to our office. It's possible I was told by Mr. Butler, "Allen Eaton has called me and said such and such."

Counsel pointed out some calls that I frankly don't **[810]** remember at my home. I suppose it's possible Mr. Eaton called me up and said something about Janowski, and if the conversation lasted a minute, I probably—

THE COURT: But the fact of the matter is, whether you learned it earlier on the 28th or not, at least by the time you read this letter on the 28th, that was the first day on which you became aware that the allegation was that the case was fraudulent; is that correct?

THE WITNESS: That is right.

THE COURT: Now—

THE WITNESS: Other than that she told—you know, my surmise about telling a white lie that would reflect in some way deleteriously on the case. • • • •

[811] • • • • THE COURT: Did you, Mr. Allis, make any attempt to consult with Ms. Janowski before sending this statement **[812]** and — these two statements to the court, based upon your knowledge before that letter was directed to the Court that maybe circumstances were different than you had presumed?

THE WITNESS: No, and may I tell you why I didn't? • • • •

• • • • THE WITNESS: Defendant's letter of December 27th.

THE COURT: Defendant's Exhibit 10.

THE WITNESS: It says — on the third paragraph, Mr. Lewis says, "Having confirmed this, we arranged inde-

pendent counsel so that we might advise her with respect to the law of attorney-client communications and any possible duty to the Court." And then at the very last paragraph, Mr. Lewis says, "We respectfully request a conference to prevent intrusion by any party or its counsel until the informant and her counsel have had an opportunity to evaluate the substance of her information and, if appropriate, inform the Court."

Now, really, what was in my mind that day, have I done something wrong by talking to my own secretary when she had independent counsel? That's the thing that worried me. But she had told us and led us to believe that this person Schuck was working with the defendant, and then that's **[813-836]** the reason, when we finally did see her on Friday, the first thing I asked her was: Is this fellow Schuck your attorney? And she said no.

So, she always—and I was very concerned about that. I didn't want to talk to her. * * * *

[836] * * * * At the hospital also she indicated that this person, Schuck, was simply working for the defendant.

But when I got this letter on stationery from what I believed to be a reputable law firm I assumed that they had arranged independent counsel, and this person was independent counsel.

And furthermore, they were asking the Court, and essentially saying that nobody should be talking to this woman. And I wouldn't have talked to this woman again for all the money in the world, for fear that I was doing something wrong.

And what galls me in this case, Your Honor, is that after they sent this letter to you, essentially saying that nobody should contact this woman, they went out the very day that they sent this letter and talked to her.

And they went out the very next day, on the 28th, and talked to this woman.

And then they went out the very next day, on the 29th, with a court reporter, to take a statement from this

woman—after writing to Your Honor and writing to us that nobody should be talking to her—this is my secretary.

And that's why I didn't. * * * *

[837] * * * * Now, she had told us that this fellow Schuck was somebody working with the defendants.

And I specifically remember—and that's why I put it in an affidavit to the court at one time—and she used the same word with Mr. Daum, Your Honor.

She said Schuck said to me I think I'm doing something unethical, but I have a favor to repay. And then she went on to say that he was in essence working for the **[838]** defendant.

So I didn't bother about Schuck when I talked to her on Monday.

But then, when I got a look at this very formal statement that she had so-called independent counsel, it did worry me.

Did I do something wrong yesterday by talking to my secretary? And then I decided I certainly had not. She was my secretary.

The court and the defendants hadn't told me she had independent counsel. Most importantly, she said she hadn't had independent counsel. And she said she hadn't talked to him yet. She was supposed to talk to this fellow the next day. And she made it very clear that he wasn't.

But when I got this—knowing—I'm very sorry to say this, but feeling as I do that the defendants are taking any opportunity they can to attack me and the other attorneys in this case, when I read this I was concerned.

Are they now going to say that in talking to my secretary I shouldn't have been talking to her because she had independent counsel?

Yes, I was concerned when I read that letter.

I determined that I had not done anything wrong in talking to her at all.

But I was concerned about it and I would not, after **[839]** seeing that, I did not make any attempt to go see her, and I wouldn't have.

And when finally she came into the office Friday, the lobby of the office building, I said I would not go down and talk to her because of this letter saying she had independent counsel and suggesting that no parties were talking to her, and no parties should talk to her.

And I wouldn't go down there to talk to her.

But Mr. Butler wanted me to because she was screaming about how we had kidnapped her baby. And he thought I was the appropriate person to calm her down.

So I said, I will not go down and talk to that woman unless we call up Mr. Coleman, our attorney, and he gives me permission. And I said, I want to talk to him personally on the phone and have that permission given to me.

And we called up Mr. Coleman and he gave me permission to go down and talk to her.

And when I went down there one of the first things I said was, is Mr. Schuck your attorney?

She said, no. What do I need counsel for?

And then I had just a very brief conversation with her, because I still felt uncomfortable.

And I said, if he's not your attorney, please contact Mr. Schuck, the Court and Mr. Coleman and get truly independent counsel appointed for you. And then at some point **[840]** in time I asked her, is everything in that statement that you gave me last Monday true? And she said, yes. And oh, by the way, Nick, they're pressuring me to sign a statement. They're out here twenty-four hours a day, et cetera, et cetera, et cetera.

And the other thing I did to be very careful was to have Mr. Canalez, a former FBI agent, with me, because yes, I was concerned about that letter.

And you can believe me that I was upset when I found out that almost every single day that the defendants had used this as a shield to keep us away from talking to our own secretary, in my opinion to mislead the court, and then to go out there day after day to talk to her, even with a court reporter.

That is over the line.

THE COURT: Well, let me say this. That isn't the question before the court now. * * * *

[841] * * * * THE COURT: I'm talking about the information that came to you on the 28th, before this statement was mailed to the Court.

THE WITNESS: The information. Okay.

THE COURT: Before the statement was mailed to the Court.

THE WITNESS: To the 28th letter.

I read it. And the question is did I think it was appropriate to then send our letter?

THE COURT: Yes. Her statement. Not your letter.

THE WITNESS: Absolutely. One hundred percent.

THE COURT: Okay. Why?

THE WITNESS: Why?

This is a statement that she signed, Defendant's Exhibit One, which in my opinion then and in my opinion today is true.

It has been completely confirmed. In fact, they are renting a comfortable apartment for her and her baby, **[842]** providing her with a rental car, other expenses, they did relocate her.

She did make a false statement in her deposition.

I believed then that they had been trying to get her to make a statement saying that she heard Cynthia Koller say that she did not take Bendectin. I believed everthing in this statement, absolutely.

THE COURT: Thank you.

THE WITNESS: And then this thing that she provided us simply confirmed it. * * * *

[849] * * * * Q. Could you have known on December 27th, when you left the hospital, the means by which she had made any contact with Davis, Polk? A. Could I have known?

Q. Yes. Did you know? A. I did not know any means by which she had contacted Davis, Polk, but I thought that at some point she had made some sort of a telephone call.

She denied saying anything in the telephone call. She denied that that was the first contact. It was only after threats and bribes, so—.

Q. Why did you settle on a telephone call as part of your conclusion?

Why did you think it might be a telephone call? A. She said to me in the hospital something to lead me to believe that she had made a telephone call after being initially contacted, threatened and bribed, and in such telephone conversation she denied saying anything that would **[850]** reflect badly upon the Koller case.

Q. So the sequence of events that she described to you was an initial interest by Davis, Polk in her. A. That's correct.

Q. Followed by a telephone call by her. A. This is what she led me to believe, that's correct.

Q. Okay.

You experimented with the idea that maybe the sequence was different; that is, that she had first called and then they came out to visit her. A. Or, I think ever more so, that they had initiated the contact, but in one of these conversations she had with Barnes out at her house during this twenty-hour-a-day surveillance she described, that maybe she had made some sort of an off-hand comment, and that was a possibility, too. * * * *

[859] * * * * I was informed, and tended to believe, that a couple of law firms were involved in unethical behavior with my secretary, so it would not surprise me at all to have another attorney that they have been able to convince to join with them to crush us, unethically, would join with them and do something like that.

That's definitely within the realm of possibility, and I believed it. That's what she told me.

Redirect Examination by Mr. Cohen

[862] * * * * Q. Your secretary was still on the firm payroll on December 28th; was she not, sir? A. That is correct.

Q. And your secretary was supposed to be performing work for you, as your secretary; is that not correct? A. Not in this particular situation, no.

Q. Did you have an agreement with your secretary that she would remain on the firm payroll and stay at home, and a typewriter would be sent to her home? A. No, there was no agreement.

I suggested to her when we stood up, ready to go, after she had given me the statement and after she'd given me plaintiffs' two, that along with her suggestion made to a number of people, several people, long before these events, that perhaps she could work at home, do tapes at home, a typewriter could be brought to her house.

This is what she had long wanted. It was certainly within the realm of possibility, and certainly she deserved it if in fact she was telling the truth, that she had been threatened and bribed by the defendant. In a way, if this **[863]** were true, what she was telling us, in a way she was kind of a heroine.

In addition, she spoke about wanting to go to Mexico, and I certainly felt that that was the last thing we wanted, would be for her to go to Mexico.

She had lived in Mexico for many years and spoke fluent Spanish, and I knew that it was entirely within the realm of possibility that she could take off to Mexico the next day.

And I did not want that to happen. I wanted her to remain as an employee, in a comfortable situation.

Now, she had come in sporadically since the birth of her severely premature infant, and had not at all come in every day. And I always assumed that this would continue until her infant was home and she actually took her maternity leave.

Q. Did you share that arrangement you discussed with Ms. Janowski on the evening of the 27th with Mr. Butler? A. I don't—I certainly did not discuss it—well, to the best of my recollection I had no discussion about anything like that with Mr. Butler on the 27th.

On the 28th I may have mentioned to him this idea that she's agreed to stay working with the firm, she's agreed to make out a statement, she's willing to stand up and tell the truth, she

wants to keep working to get her mind off [864] everything, because she really wants to keep working one of the possibilities is that she can do some work at home, as she is requested to do, for a number of months.

Q. And to the best of your recollection that was shared with Mr. Butler on the 28th. A. I don't recall.

It's not an important or significant piece of information because there was no agreement with Ms. Janowski with regard to that at all.

I may have told him on the 27th. I don't recall.

But I presume I probably told him by the end of the day on the 28th. But even then, I can't be a hundred percent certain.

Q. Are you through, sir? A. Yes.

Q. Did he have any objection to that arrangement, once you shared it with him? A. He voiced no objection, that I recall.

Q. Are you through, sir? A. Yes. • • • •

Order to Show Cause of the District Court
Filed April 29, 1983

FILED—Apr 29 1983—James F. Davey, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1258

ANNE ELISABETH KOLLER, *et al.*,

Plaintiffs,

v.

RICHARDSON-MERRELL, INC.,

Defendant.

ORDER TO SHOW CAUSE

Upon consideration of defendant's motions to impose sanctions on plaintiffs' counsel for certain incidents of alleged misconduct, plaintiffs' opposition, the accompanying memoranda of law, the argument of counsel on February 27 and March 16, 1983, the evidence adduced at the evidentiary hearing of March 9-16, 1983, and the entire record herein, it is this 29th day of April, 1983

ORDERED that counsel for plaintiffs shall show cause on May 31, 1983, at 10:00 a.m. why the law firm of Butler, Jefferson, Dan & Allis (Butler firm) should not be disqualified from further representation of plaintiffs in the above-captioned matter due to the following alleged incidents of misconduct:

1) James Butler's January 31, 1983, release of information concerning defendant's experience with Bendectin, Thalidomide, and MER-29, including fourteen drug experience reports (DERs), to the Food and Drug Administration (FDA) and the Washington Post• in an effort to prejudice the jury pool awaiting selection for the contemplated trial of this action in February or March and to bring inadmissible evidence before the jury pool in contempt of three separate evidentiary rulings previously entered by this Court;••

2) Nicholas Allis' preparing and obtaining a statement from Krystyna Janowski retracting her previous statement to defendant that the instant case was fraudulent without regard for the

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• There is no indication that the information released was informative or newsworthy since a substantial amount of the information released already was in the possession of the FDA and available to any news organization.

•• The information released included references to Thalidomide and MER-29, the DERs of the Sands and Cordova children, and fourteen DERs submitted well over a year after birth. Yet, the Court previously ruled that this information was inadmissible at trial. *See* Orders of October 19, 1982 (references to Thalidomine and MER-29), January 17, 1983 (Sands and Cordova DERs), January 31, 1983 (no DERs submitted more than one year after birth and no more than five DERs detailed).

truth of Ms. Janowski's retraction in an apparent attempt to protect the Butler firm's financial interest in this and other related matters by thwarting any further investigation into the circumstances surrounding and the basis for Ms. Janowski's original statement.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

Plaintiffs' Memorandum Filed May 27, 1983 Regarding the District Court's Order To Show Cause

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United States District Court
for the District of Columbia

(Caption Omitted in Printing)

MEMORANDUM REGARDING THE COURT'S ORDER TO PLAINTIFFS TO SHOW CAUSE WHY JAMES G. BUTLER SHOULD NOT BE DISQUALIFIED AS COUNSEL FOR RELEASING THE DRUG EXPERIENCE REPORTS TO THE WASHINGTON POST AND THE FOOD AND DRUG ADMINISTRATION

• • • •

Plaintiffs herewith incorporate by reference the Affidavit of James G. Butler filed herewith. • • • •

Dated: May 26, 1983

Respectfully submitted,

BUTLER, JEFFERSON, DAN & ALLIS
By /s/ JAMES G. BUTLER
James G. Butler
816 Connecticut Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 463-0679

• • • •

(Certificate of Service Omitted in Printing)

Affidavit of James G. Butler Dated May 24, 1983 in Support of Plaintiffs' Memorandum Regarding the District Court's Order to Show Cause

(Caption Omitted in Printing)

• • • •

AFFIDAVIT OF JAMES G. BUTLER

James G. Butler, being duly sworn, hereby deposes and says:

1. I am a member of the law firm of Butler, Jefferson, Dan & Allis, attorneys for Plaintiff. I am a member of the Bar of the District of Columbia, the State of California and of various federal courts.

2. Attached herewith is a copy of my letter to the Food and Drug Administration dated January 28, 1983, which was mailed by Express Mail, together with a copy of the receipt showing that it was mailed on January 29, 1983, marked as Exhibits 1 and 1A.

3. I traveled to Washington, D.C. on Sunday, January 30th, and Tuesday, February 1, received a phone call at the River Inn

in Washington, D.C., from Morton Mintz, the reporter for the Washington Post and gave him an interview regarding the contents of the material which had been mailed to the Food and Drug Administration. These materials are very newsworthy because they show an association with Bendectin of severe Thalidomide-like effects in the children. They are particularly important because the malformations are bilateral which are extremely rare types of malformations and to my information and knowledge, no other cause has been demonstrated. I believe after extensive research that Bendectin is the cause of the malformations in most, if not all, of the children. Research necessary to compile the answer to defendant's questionnaire regarding the 14 children was started as early as October 1982 with the obtaining of the medical records and accurate information concerning the children. The authorization obtained for the release of the information to the Food and Drug Administration and the media was obtained during the month of January 1983. I never interpreted the various evidentiary orders cited by the court in the Order to Show Cause to be an order that would prevent me from communicating with the Food and Drug Administration or the press or any of the media. My discussions with Morton Mintz of the Washington Post was not intended in any way to have violated any court order made in the Koller case and was not intended in any way to influence any juror or potential juror. I was never of the belief that I was under any restraining order to prevent such material from being directed to the FDA nor did I believe I was under any gag order not to release material to the press. I believe that the Bendectin controversy is a matter of high public importance and it must be brought to the attention to the government and to the public that the continuance of this drug on the market represents high risk to pregnant mothers and to the infants in utero if exposed to doxylamine succinate.

3. With respect to the court's order to show cause as to why we should not be removed from the case, I believe that the answer why we should not be is very simple. Our office and my office of Butler, Jefferson, Dan & Allis have taken active

participation in the preparation of the case since January 1981. The court is requested to take judicial notice of the files and records and the docket sheet thereof, a copy of which will be attached herewith and marked as Exhibit 2. During the pendency of the litigation, our office actively participated in the litigation as reflected in the docket sheet and the pleadings and depositions taken therein. I or my partner, Nicholas Allis, personally sought out and interviewed all of the experts called by the plaintiff in order to determine whether the drug was teratogenic and whether it caused the malformations of Anne Koller. We have traveled across the country many times in connection with the depositions and specifically have participated in representing the plaintiffs in many depositions including the following:

Nicholas Assali, George L. Barnes, Nancy Barnes, Thomas H. Beaver, Bruce J. Brennan, Carl A. Bunde, Luis Castillo, Frederick Crescitelli, Alan K. Done, Alan M. Ezrin, Rena C. Falk, Alan Garfinkel, John Gibson, Andrew G. Hendrickx, Lester T. Hibbard, Mark T. Hoekenga, Dorsey E. Holtkamp, Ivan Husovsky, Krystyna Janowski, Herschel Jick, John Koller, Cynthia M. Koller, William L. Kuhn, Widukind Lenz, Alan C. Levy. Elizabeth Loftus, Michael Melnick, Lucille Milkovich, Bernard L. Mirkin, Thomas McCash, Leroy Neltner, James W. Newberne, Stuart A. Newman, Robert L. Podosin, Raymond C. Pogge, Emil Robert Reed, Carol Rhoads, Jackson E. Rhoads, Peter R. Roll, Patrick M. Ryan, Raymond G. Schultz, Harold C. Slavkin, Robert E. Staples, Shanna H. Swan, Johannes B. Thiersch, Mark Thoman, David Valle, Bea Van den Berg, and James G. Wilson.

We have obtained and reviewed all other depositions. I personally was present at the examination of the records of Richardson-Merrell commencing in April, May and June of 1981. Hundreds of exhibits consisting of thousands of documents have been examined, indexed and prepared for trial. From October 1982 until February 1983, our office prepared all of the documents in connection with the exhaustive pretrial preparations including listing of all exhibits, indexing of all of the depositions, preparing jury instructions, preparing memo-

randa of law in connection with the many motions, pretrial and trial and have done all of the incidental preparation for the trial. This preparation involved not only the work of myself and Mr. Allis but also the training, supervision and work of 4 to 6 paralegals, 5 of 6 secretaries and several other law members of our firm. This preparation included working every Saturday and Sunday for many months before the trial date of January 1983. In preparation for trial, it was agreed that the principal trial attorneys would be myself and Mr. Allis with the assistance of Mr. Eaton and Mr. Wiley Branton. It is my opinion that our removal from the case would severely injure the cause of the plaintiff, Anne Koller.

I ordinarily do not keep time records in connection with this or any other case involving contingent fees, but based on the knowledge that I have worked at least 80 percent of the time devoted to the law practice in the last two years, I believe that I have personally worked at least 3,500 to 4,000 hours and that Mr. Allis has worked at least 2,000 hours and that other paralegals and other people in the office worked at least another additional 1,000 hours.

I probably have more litigation and trial experience generally than any other members of the plaintiffs' team. I also am one of a handful of practitioners who have specialized in drug litigation and have had extensive trial and litigation experience involving pharmaceutical drugs. With respect to the Koller case, I probably have more knowledge of the factual and legal issues than any other counsel representing the plaintiffs and I have put this experience and preparation at the disposal of the minor plaintiff through her parents. I am of the opinion that the minor plaintiff's case will be seriously harmed if the court should see fit to remove me from the trial of the case. Also Mr. Nicholas Allis, my partner, has worked long and hard with me in this case and has achieved a special knowledge even superior to mine in connection with the various epidemiology studies that have been conducted and his presence and knowledge is necessary in the pretrial of this case. I am also of the opinion if he is removed, the child's case will be seriously damaged. I further believe that if we are removed that the court should

certify the matter for immediate appeal under 28 U.S.C. § 1292b and postpone the matter for at least a year to enable Anne and Cynthia Koller to obtain other counsel to try the lawsuit or, in the alternative, to transfer the case to the Multi-district Litigation proceedings in Ohio pending completion of those matters now pending before Judge Carl Rubin.

/s/ JAMES G. BUTLER
James G. Butler

Sworn to before me this
24th day of May 1983.

/s/ CAROL M. ASAKURA
Notary Public

OFFICIAL SEAL
Carol M. Asakura
Notary Public—California
Los Angeles County
My comm. expires Oct 28, 1983

Exhibit 1 to Affidavit of James G. Butler Dated May 24, 1983

Exhibit 1, Letter of James G. Butler to Arthur Hull Hayes, Commissioner, Food and Drug Administration Dated January 28, 1983 previously appears in the record and is reprinted at pp. 134-35, *supra*.

Exhibit 1A to Affidavit of James G. Butler Dated May 24, 1983—U.S. Post Office Express Mail Receipt

BEST AVAILABLE COPY

Defendant's Memorandum Re: The Calling of Krystyna Janowski and for an Expanded Evidentiary Hearing Filed May 27, 1983

United States District Court
District of Columbia

(Caption Omitted in Printing)

DEFENDANT'S MEMORANDUM (1) IN OPPOSITION TO PLAINTIFFS' MOTION REGARDING THE CALLING OF KRYSTYNA JANOWSKI OR OTHER WITNESSES ON BEHALF OF PLAINTIFFS OR THEIR COUNSEL ON MAY 31, 1983 OR (2), IN THE ALTERNATIVE, FOR AN EXPANDED EVIDENTIARY HEARING RELATING TO ISSUES OF FRAUD ON THE COURT

Defendant Richardson-Merrell Inc. submits this memorandum with respect to plaintiffs' May 24, 1983 motion requesting the Court to instruct defendant to produce Krystyna Janowski as a witness on May 31, 1983, the return date set in the Court's order to show cause filed April 29, 1983 regarding disqualification of plaintiffs' counsel.

Defendant opposes plaintiffs' motion. Plaintiffs' motion should be denied because

(1) plaintiffs misconstrue the Court's April 29 order: Ms. Janowski's credibility is not at issue on disqualification of plaintiffs' counsel; and

(2) plaintiffs' calling of Ms. Janowski is inexcusably untimely: they failed to call her or any witness at the evidentiary hearing held on March 10-16 despite repeated opportunities by the Court to call any witnesses they

desired. Moreover, plaintiffs had available at the hearing the six-day deposition of Ms. Janowski previously taken in Los Angeles before the Honorable Gerard D. Reilly as Special Master in January, 1983. Even though plaintiffs' counsel had cross-examined Ms. Janowski for nearly five days in that deposition, plaintiffs offered no portion of that deposition in evidence at the March hearing.

If the Court determines that Ms. Janowski should be called, defendant is, of course, willing to request Ms. Janowski, through her counsel, Carl J. Schuck, Esq., to appear at a time convenient to the Court. In that event, defendant submits that additional witnesses and evidence should be allowed and, if necessary, additional discovery. Since the time of Ms. Janowski's disclosures relating to fraud on the Court, defendant has located witnesses whose expected testimony corroborates Ms. Janowski's testimony that Mrs. Koller did not take Bendectin when she said she did.

Finally, defendant's counsel has been apprised by copy of a letter to the Court on May 26, 1983, that plaintiffs intend to call additional witnesses on May 31. Defendant opposes the calling of such witnesses as also untimely. To the extent such witnesses are being called to offer character evidence, as we understand may be the case, that evidence is inadmissible in this proceeding.

POINT I

KRYSTYNA JANOWSKI'S CREDIBILITY IS NOT AT ISSUE

Plaintiffs contend in their present motion (Points and Authorities Paras. 1-2) that the Court's April 29 order has now made the question of "whether Ms. Janowski was truthful in her [December 27, 1982] statement . . . the central issue" in this proceeding (*id.* Para. 1). Plaintiffs support this contention (1) by taking out of context the phrase in the Court's order

referring to Mr. Allis' preparation of that statement "without regard for the truth of Ms. Janowski's retraction . . . ," and (2) by pointing to the Court's general reference in its order to "the entire record herein. . . ."

These fragments are no indication that the nature of the Court's inquiry on disqualification has in any way changed. The Court made it abundantly clear that the truthfulness of Ms. Janowski was not at issue. What was at issue was the mental frame of mind of plaintiffs' counsel when Mr. Allis had Ms. Janowski sign the statement he prepared on December 27 and when Mr. Butler forwarded that statement to the Court on December 28, 1982:

> "[THE COURT:] The depositions leave me with the impression that there is something that I must be concerned about, that I must know about, that I must try to determine, not whether Krystyna Janowski is a credible witness or not, but whether or not whatever Krystyna Janowski knows or does not know plaintiffs have tried to keep from me . . . ." Transcript of March 8, 1983 at 10 (emphasis added).*

The Court's April 29 order to show cause is not at variance with the Court's prior statements. Plaintiffs' present motion

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* The Court's March 8, 1983 order scheduling the evidentiary hearing similarly phrased the issue (pp. 2-3):

> "whether any fraud has been perpetrated on the Court by any member of the firm of Butler, Jefferson, Dan & Allis or any agent or employee thereof in connection with the actions of said firm during the period December 22 through December 31, 1982 in connection with the obtaining of the [December 27] Statement of Krystyna Janowski and the submission of [the] Statement to the Court; . . ."

The March 8, 1983 transcript and the March 8, 1983 order are annexed as Exhibits A and B, respectively, to the affidavit of Ogden N. Lewis, sworn to May 27, 1983, and submitted herewith (hereafter "Lewis Aff.").

distorts the Court's clear focus. Furthermore, no portion of the evidence adduced by defendant at the evidentiary hearing rested on the truthfulness of the December 27 statement signed by Ms. Janowski. Defendant did not call Ms. Janowski nor did it offer any of her deposition testimony in evidence. Defendant's evidence rested entirely on testimony of what plaintiffs' representatives and Mrs. Koller said to each other and believed at the time and what action they took after they became aware of Ms. Janowski's disclosures.

• • • •

Excerpts from United States District Court for the District of Columbia Order to Show Cause Hearing Transcript of May 31, 1983

The Honorable FRANCIS F. VAN DUSEN, called as a witness by the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Stein

[11] • • • • Q. Do you have an opinion, based on the considerations you have given us, concerning Mr. Allis's honesty and integrity? A. I do.

Q. And what is it? A. My opinion is that he's an exceptionally honorable person, and I say with all the earnesty that I can command that I cannot believe that this young man would do something dishonest. • • • •

JOHN K. VAN de KAMP, called as a witness by the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Stein

[24] • • • • Q. Do you have an opinion as to his honesty and integrity? A. I do.

Q. And what is it? A. Very high. I hired him on the basis that he had a commitment, an interest, without ulterior motives; frankly, that he was willing to sublimate himself to his work and to his clients, and frankly to higher causes, and he did not let me down in that job.

Q. Did he ever demonstrate to you any guile or cunning? A. No, just the opposite. I mean, he's a little bit of a Jimmy Stewart kind of character, quiet and taciturn, a person who worked long hours hard for his clients, oftentimes got good results. • • • •

AERIAL C. HILTON, called as a witness by the plaintiffs, having been duly sworn, was examined and testified as follows:

Re-Direct Examination by Mr. Stein

[46] • • • • I would describe Nick as a humanitarian and I think he carried that through. I think in his private life it's that way, and he has that reputation among the lawyers. I would definitely say it would be a very difficult thing to persuade me otherwise. • • • •

MICHAEL J. LIGHTFOOT, called as a witness by the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Stein

[49] • • • • A. I believe that Nick Allis is a lawyer of impeccable integrity, who, in my estimation from my experience with him, is incapable of doing things which require cunning.

I found him and find him today to be a man of the utmost integrity.

Q. Do you know other people who know him? A. I do.

Q. Has his reputation ever come up for comment among people? A. Mr. Stein, it has. He has such unusual characteristics that he's one of the few lawyers I know about whom other lawyers speak.

Q. And what do they say? A. They say that he is an unusually candid, straightforward human being, and I think it's fair to say that they also view him as someone who doesn't have the capability of acting with guile or cunning. • • • •

JAMES PHILIP CONN, called as a witness by the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Stein

[59] • • • • I believe that Mr. Allis is a man of high integrity, of sincere honesty.

Q. Have you ever seen any guile or cunning on his part? Is he that type of person? A. No, no, never, and I think that it's also true in terms of his relationships with his neighbors in the community. • • • •

Cross-Examination by Mr. Cohen

[60] • • • • Q. All right. Assuming Mr. Allis as a matter of fact did what is contained in paragraph two on the second page of Judge Johnson's order. Assume that for a moment, sir. Would that in any way change your opinion that you've just given this Court concerning his reputation and your opinion about his honesty, integrity, et cetera? A. I believe that Mr. Allis is incapable of doing the action that was described in that paragraph on page 2 of that **[61]** order.

Q. I respect that, sir. Now, could you answer my question. If he did, would that change your opinion? A. It would be so inconsistent with everything that I know about Mr. Allis, as I have known him personally as his minister for ten years, it would be so totally inconsistent that it would be inconceivable to me. • • • •

DR. SYDNEY W. GROSS, called as a witness by the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Stein

[64] • • • • A. Well, I started at the bottom of the ladder as an assistant adjunct and worked my way up so that I became head of the department, chief of neurosurgery and professor of neurosurgery at the Mt. Sinai Medical School for a period of about seventeen years.

Q. In that capacity did you have as an obligation the evaluation of people as to character and competence? A. Yes, I did. I was in charge of a training program which was approved by the American Board of Neurological Surgery for four years of training in neurosurgery. I had to select candidates for the job, and then over the years these men have practiced in various parts of this country and, as a matter of fact, all over the world, and I have seen them at meetings and I have had a chance to evaluate them and whether or not they lived up to my expectations. • • • •

[66] Q. Did you designate him as your executor? A. I did.

Q. When did you do that? A. Oh, approximately a year ago.

Q. Why did you do that? A. Well, at the time I had some family problems and wanted to change my will.

Q. Did you have trust in Mr. Allis? A. I certainly did.

Q. Based on what? A. On my knowledge of his behavior in the various matters that came up, and in my total knowledge of him socially in the way he behaved.

Q. Do you have an opinion as to his honesty and integrity? A. I have.

Q. And what is it? A. He is an individual of the highest integrity. I can't imagine Nick Allis doing anything that was unethical or immoral. • • • •

Cross-Examination by Mr. Cohen

[69] • • • • Q. All right. With that in front of you, sir, if Mr. Allis—assuming for a moment that Mr. Allis did what is set out in paragraph two of that order, if Mr. Allis did that, would that in any way change the opinion that you have already given to this Court as to your opinion of his honesty

and integrity? **[70]** A. Well, that would be so preposterous that I couldn't possibly believe that about Mr. Allis. I have known him. I've talked to other lawyers who have known him, and that would be so out of character that I couldn't possibly believe it, no matter what.

Q. But assuming for a moment—well, let me ask it this way. If someone did what is set out in that order, would it be fair to state that your opinion about them would be that they are not a person of the highest honesty and integrity? A. Well, I can't possibly tie this in with anything that Mr. Allis would do, and therefore I can't see how it is at all applicable to this matter. It's so out of character to what I know about Nick Allis and from what I have learned from other people that—I've dealt with lawyers for many years now and he is absolutely unique in the way he approaches matters and his entire attitude. I can't believe that Nick Allis would do anything of this.* * * *

Supplemental Affidavit of Ogden N. Lewis
Dated June 8, 1983

United States District Court
for the District of Columbia

(Caption Omitted in Printing)

SUPPLEMENTAL AFFIDAVIT OF OGDEN N. LEWIS

* * * *

Ogden N. Lewis being duly sworn deposes and says:

1. * * * *

I make this supplemental affidavit in response to

* * * *

Mr. Butler's disclaimer of intent to influence the February and March jury pools.

2. Annexed hereto as Exhibit A is an affidavit of Richard A. Black, Esq., sworn to June 2, 1983. Mr. Black was counsel for defendant SmithKline in the case of *Johnson v. SmithKline*, cause number C-266659, which was tried in 1975 before the Honorable Yale McFate and a jury in the Superior Court of Maricopa County, Arizona. Plaintiffs in that case were represented by James G. Butler, Esq. I am informed that that case resulted in a defense verdict. Mr. Black has annexed to his affidavit a copy of an article about that case appearing in *The Arizona Republic* on September 7, 1975.

* * * *

7. Annexed hereto as Exhibit F is a copy of a transcription of the December 27 tape made by William Harward on June 5, 1983, together with a blacklined version to show differences between his transcription and that made by Patricia Potter (Exhibit C). The blacklining was done by paralegals employed by Davis Polk & Wardwell who compared Exhibit C to Exhibit F. Mr. Harward's biographical summary is also included in Exhibit F.

/s/ OGDEN N. LEWIS
Ogden N. Lewis

Sworn to before me t[illegible]
8th day of June, 198[illegible].

/s/ NANCY Z. BUCK
Notary Public
My Commission Expires September 30, 1984

(Certificate of Service Omitted in Printing)

Exhibit A to Supplemental Affidavit of
Ogden N. Lewis Dated June 8, 1983

STATE OF ARIZONA,
COUNTY OF MARICOPA, ss.

AFFIDAVIT

RICHARD A. BLACK, upon his oath, deposes and says:

1. I am licensed to practice law in the State of Arizona and I am a member of the law firm of Black, Robertshaw & Copple, 3003 North Central Avenue, Phoenix, Arizona.

2. I was counsel of record representing SmithKline Corporation in an action entitled *Johnson vs. SmithKline*, Cause No. C266659 in Maricopa County Superior Court, State of Arizona.

3. The allegations of the Complaint were that the drug Compazine, manufactured and sold by SmithKline in the United States, was defective and unreasonably dangerous and further that the warnings and indications set forth on the inserts provided by SmithKline were inadequate to sufficiently warn of the dangers in the use of the drug, particularly when administered to children.

4. The Complaint further alleged that the unreasonably dangerous effects of the drug Compazine were known to SmithKline long before the drug was consumed by the plaintiff Laurie Johnson. Laurie Johnson was alleged to have become permanently crippled and to have suffered mental retardation as a result of taking Compazine.

5. Trial in the matter commenced June 9, 1975. On or about Friday, August 29, 1975, in any event on a day during that week after which the jury in the case would not be in attendance in Court until the following Tuesday, I received a telephone call from one Brent Whiting, a newspaper reporter with the Arizona Republic who stated that he had been given a statement about the case by the attorneys for Laurie Kay Johnson and Mr. James Butler in particular. Mr. Whiting explained that Mr. Butler had pointed out to him that various defendants in the case had settled out and that SmithKline had offered $100,000 but that the sum was not sufficient and had been rejected. (Court records contain an Offer of Judgment of $100,000.) Mr. Whiting further explained that Mr. Butler had told him there were two matters that Mr. Butler thought were of particular importance in the case, the first being the fact that Rhone-Poulenc, the owner of the patent and developer of the drug Compazine, had withdrawn the drug from the market in France at the request of the French Government, but that

SmithKline had not informed the FDA of this fact even though it was done during the period of application for approval of the drug here in the United States, and secondly, that the FDA had made requests to SmithKline that it alter the wording of its inserts relative to the use of the drug by children and that in fact an urgent request by the FDA had been made three days after Laurie Kay Johnson had been administered the drug which caused her to be crippled.

6. Mr. Whiting stated he wanted to hear "my side of the story". I advised Mr. Whiting that I could not comment on the case since it was presently in litigation and that any article publication in the paper could be very damaging to the trial. I particularly warned Mr. Whiting that any reference to the Rhone-Poulenc situation would surely result in a mistrial and that this was probably true of the FDA situation as well. Mr. Whiting wanted to know what there was about these situations that I considered particularly damaging and I replied I could comment no further. Mr. Whiting stated that the plaintiffs' attorneys had had no such reservations and he disagreed with my thinking. I asked that Whiting call the Judge and get permission before publishing the story and he refused, stating that the article would appear in the Sunday morning paper, August 31.

7. My particular concerns over the statements of Reporter Whiting was that he was proposing to publish about facts which were in dispute as to their admissibility and according to preliminary rulings by the Court, might be admitted only with the admission of other explanatory material or under certain instructions from the Court to the jury.

8. I immediately called the Presiding Judge in the case, Judge Yale McFate, who advised me he knew the editor of the paper and would attempt to persuade him to withhold the story until after the trial. Judge McFate called me on the telephone some time later stating that the editor was unable to accommodate the Judge but that he would attempt to get the story delayed one week so that the Court would have the opportunity to instruct the jury not to read the article.

9. On Tuesday, September 2, Court and counsel met in the Judge's Chambers prior to trial. Judge Yale McFate expressed great concern over the possibility of a mistrial because of what might appear in the article to be published by Whiting. The Judge was quite aggitated that we could lose the jury after having tried the case for nearly three months. Judge McFate stated he had spoken with Whiting, expressed to him his fears about a possible mistrial, but that the most he had been able to accomplish was an agreement that the article would not appear until the following Sunday. Judge McFate stated he had taken the matter up with a number of other judges on the Superior Court Bench in Maricopa County and expressed the opinion that he believed he did not have the authority to order the reporter not to publish the article.

10. On the last trial day of that week, the Court specifically told the jury that there would be an article in the Sunday morning Republic about the trial and that they should not read it. The jury was told that if any juror read the article, they might have to be excused from the trial and that this could result in the undoing of all the time and effort that had been involved in the trial to that date.

11. On Sunday, September 7, 1975, the attached article appeared in the newspaper. The reference to the Rhone-Poulenc situation was not included. The settlements and the FDA communications regarding the warning statement "three days after Laurie was crippled" did appear.

12. One juror acknowledged having read the article and was excused for cause.

/s/ RICHARD A. BLACK
Richard A. Black

The foregoing was acknowledged before me this 2nd day of June, 1983, by RICHARD A. BLACK.

/s/ SUE MONISE
Notary Public

My Commission expires:
4-15-87

THE ARIZONA REPUBLIC
(Section B) Page 1 ○ Sunday, Sept. 7, 1975

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Attachment to Affidavit of Richard A. Black—
Arizona Republic Article of September 7, 1975

Long trial predicted in $2 million suit against drug maker

about B2

Wrongful drug suit

By BRENT WHITING

Seven years ago, when she was 13 months old, Laurie Kay Johnson became so ill that her parents decided to take her to the doctor.

The parents, LaCroy and Eileen Johnson of 5121 W. Hearn Road, Glendale, were worried that their little girl was suffering from a case of stomach flu.

They hoped that Laurie's physician could stop their daughter's vomiting and restore her to normal health.

But, instead of improving, her condition quickly worsened and within a day she suffered brain and nervous system damage resulting in mental retardation and partial paralysis in her right arm and leg.

Laurie, an attractive blue-eyed blonde and her parent's only child, had been crippled for the rest of her life.

Phoenix attorney Richard A. Black, legal counsel for the drug manufacturer, has declined comment on the suit.

Court records show that Black offered to settle the suit out-of-court May 19 for $100,000, but that the offer was refused by the Johnsons' attorneys, Jeffrey R. Timbanard of Phoenix and James G. Butler of Los Angeles.

Court records also show that three other defendants named by the Johnsons when they filed the suit in 1972 already have agreed to out-of-court settlements.

One of these is Phoenix family physician Dr. John E. Cahill, who settled for $175,000, according to testimony in the present trial. Cahill was charged by the Johnsons with administering Compazine suppositories to Laurie.

Continued from Page B-1

to pay a "minimal settlement" rather than spend thousands of dollars in extended litigation.

Evidence in the ongoing product liability trial includes testimony from medical authorities from throughout the nation. Also included are scores of heavy looseleaf binders containing thousands of documents pertaining to the history of Compazine.

Smith, Kline and French brochures indicate that the drug has been used in the United States since 1956 and that it was developed and tested in cooperation with a French pharmaceutical company which discovered it.

In medical language, Compazine is a brand name for prochlorperazine, which is a category of phenothiazine, according to court records.

Smith, Kline and French brochures indicate that the drug is intended to

In August 1968, four months prior to Laurie's illness, according to documents presented in evidence by attorneys for the Johnsons, the Food and Drug Administration ordered Smith, Kline and French to include a warning on Compazine labels that the drug is not recommended for young children.

The documents show that a Smith, Kline and French official replied two months later that in the future Compazine labeling would contain this phrase:

" 'Compazine' is not recommended for children under 20 pounds in weight or 2 years of age, except where potentially lifesaving."

Two months later, three days after Laurie had been crippled, he [illegible] wrote to the drug maker [illegible] that the revised labeling [illegible] within 30 days, according to the documents.

In February 1969, more than [illegible]

could stop their daughter's vomiting and restore her to normal health.

But, instead of improving, her condition quickly worsened and within a day she suffered brain and nervous system damage resulting in mental retardation and partial paralysis in her right arm and leg.

Laurie, an attractive blue-eyed blonde and her parent's only child, had been crippled for the rest of her life.

For nearly three months now, a Superior Court jury has been hearing evidence in a $2 million product liability suit brought by Laurie's parents against a Pennsylvania pharmaceutical company.

The case began June 9 and is expected to last several more weeks. Judge Yale McFate, who is presiding at the trial, predicts it will be one of the longest in Maricopa County history.

The defendant is Smith, Kline and French Laboratories of Philadelphia, makers of the drug Compazine, a widely used prescription remedy that is sold as syrup or suppositories for relief from vomiting and nausea.

The Johnsons alleged in their suit that Laurie's crippling injuries were caused by this drug.

The suit contends that Compazine contains toxic substances which render it dangerous to infants less than 2 years old or weighing less than 20 pounds, if not used properly.

The suit charged Smith, Kline and French with negligence by failing to disclose the alleged dangers of the drug to the medical profession at the time Laurie was treated for her illness in 1968.

other defendants named by the Johnsons when they filed the suit in 1972 already have agreed to out-of-court settlements.

One of these is Phoenix family physician Dr. John E. Cahill, who settled for $175,000, according to testimony in the present trial. Cahill was charged by the Johnsons with administering Compazine suppositories to Laurie.

Cahill's attorney, Robert G. Beshears, has declined comment on why the doctor decided to settle the suit.

The other two defendants settling out-of-court were Phoenix neurosurgeon Dr. Harry Danielson and St. Joseph's Hospital. Lawyers decline to discuss the amount of settlement, but court sources indicate that it was less than $10,000 each.

The suit alleged that Danielson treated Laurie at St. Joseph's Hospital about 14 days after she was treated by Cahill, but that Danielson failed to diagnose Laurie's condition as a reaction to Compazine.

Danielson's attorney, Walter Cheifetz, denies that the doctor was guilty of any negligence but said that Danielson agreed to pay a "nominal sum" to avoid the high cost of defending himself in a prolonged trial.

And Roger C. Mitten, attorney for St. Joseph's Hospital, denies any negligence on the part of the hospital but said that hospital administrators agreed

Continued on Page B-2

Smith, Kline and French brochures indicate that the drug has been used in the United States since 1956 and that it was developed and tested in cooperation with a French pharmaceutical company which discovered it.

In medical language, Compazine is a brand name for prochlorperazine, which is a category of phenothiazine, according to court records.

Smith, Kline and French brochures indicate that the drug is intended to control nausea and vomiting and to reduce excitability and hyperactivity in children with behavior disorders.

Excluding the suit now being tried before McFate, court records show that the drug manufacturer has been involved in 21 other product liability suits in cases relating to Compazine.

The records show that four of the cases still are pending in Florida, Illinois and California and that the others have been closed, either in judgment for Smith, Kline and French or in settlements ranging from $3,000 to $300,000.

In their suit, the Johnsons contend that at the time Laurie was treated, Smith, Kline and French expressed warranties to the medical profession that Compazine was effective, proper and safe and could be used without fear if used as directed.

But the suit argued that Smith, Kline and French failed to warn doctors of the injuries that could result if the drug were misused. The suit said the firm also failed to indicate steps to be taken in the case of excessive use of the drug.

Compazine is not recommended for children under 20 pounds in weight or 2 years of age, except where potentially lifesaving."

Two months later, three days after Laurie had been crippled, the FDA wrote to the drug maker and urged that the revised labeling take effect within 30 days, according to the documents.

In February 1969, more than two months after that, the documents show, Smith, Kline and French replied that the new labeling would be put in use beginning in March 1969.

Other documents presented in evidence contain this 1972 memo written by a Smith, Kline and French official:

"In 1968 he (Dr. Cahill) prescribed 2.5 mg. 'Compazine' suppositories for a 13-month-old, 22-pound child; 7.5 mg. was administered over an 18-hour period.

"After the third suppository, the child suffered a convulsive seizure which Dr. Cahill considered epileptic rather than related to the use of 'Compazine.'

"After the seizure the child's right arm was paralyzed . . . Four years later the child is still 25 per cent disabled."

Another document presented in evidence contains a 1972 Smith, Kline and French memo which notes that a suit had been filed by the Johnsons. It reads:

"The plaintiff is suing for $2 million but Dr. Cahill believes it is a nuisance suit and they hope to settle out-of-court before trial begins."

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Exhibit F to Supplemental Affidavit of Ogden N. Lewis
Dated June 8, 1983

TRANSCRIPTION OF CONVERSATION HELD ON 12-27-82 BY KRYSTYNA JANOWSKI AND FLOYD HUMPHRIES AND NICHOLAS ALLIS (FIRST TAPE RECORDING)

Time		
4 sec.	*F*	*(U.I.) ok uh huh.*
	M	*Alright thank you.*
	F	*Thank you*
33 sec.		(Movement and walking sounds approximately 20 seconds)
		Sound of knocking on door
	F	*Go get it I'm (U.I.)*
	M	*Si*
	M	*Who is it?*
	N.A.	*It's Nick.*
	F	*(U.I.)*
	N.A.	Kay
	F.H.	*So far so good. You've got that sheet with you—that paper?* (Traffic noise in background)
	N.A.	*Yeah.*
		(Click sound—possible stop/start of recorder)
	M	*(U.I.)*
	F.H.	*Luis*
1'05"	*N.A.*	*Beg pardon . . .*
	M	(U.I.)
	F.H.	*I think there's gonna be trouble.*
	N.A.	*Ok.*
	F.H.	*Asking each other whether they're expecting (U.I.)* (Sounds of muffled voices, footsteps and door being answered)

---

* Italized material is underscored in original.

M *I'm Luis. . .*
N.A. *Hi Luis. I'm sorry to bother you folks.*
L.C. *No it's come in, come in.*
(Voices overlapping).

1'30" K.J. *Come in.*
F.H. The last thing you want is a delegation.
K.J. Oh . . .
F.H. But ah, there's a there's a humane and a and a friendly reason—okay?
K.J. *Yes.*
L.C. *Okay, sweli.*
K.J. Floyd, you haven't met my roommate, Luis Castillo.
F.H. Hello Luis.
[Garbled]
F.H. Thank you.
(Sound of door shutting)
N.A. Sorry to interrupt your . . .
K.J. Well we were *all* going to be planning on going to bed real early tonight *anyway.* We're making plans for my little girl. *She'll probably be home in two or three days.*
F.H. Oh, *that's good.* I don't want to sit *down* here all by myself.
K.J. Okay.

2'06" F.H. Nick, one of us can . . . Nick . . .
K.J. Okay
F.H. Well . . . [garbled]
N.A. O h h h . . . So how is . . . how is she doing today?

2'27" K.J. Well, she lost a little bit of weight. But sometimes they urinate or something just before the weight is taken. So that doesn't necessarily mean anything, *but then again* [garbled]

N.A. Right.

2'39" F.H. We noticed two fellows out there.
K.J. Oh, they follow me around all the time.
F.H. *Do you know that those two guys are out there?*
K.J. [Chuckle] . . . you're kidding!
L.C. That's *the fourth car we've seen sitting out there.*
K.J. (U.I.) *problem* I haven't seen (U.I.) *that great. . .*
N.A. Oh no, they are probably *after* (U.I.)
K.J. Well the people next door *are constantly under surveillance. The guy is a* (U.I.)
N.A. Oh, is that right?

3'0" K.J. What did he call him—*Peter Sellers and he's always being (U.I.) round and you can never catch him.*
F.H. Wow . . .
K.J. *Those are the neighbors* . . . Because of them we changed from a back apartment to a front apartment. Because there were a lot of *police always* trying to break up wild parties and then they were always screaming and the wife beating her up *and this went on every night so we changed you know* (U.I.).
F.H. Is that right? Wow.
[Pause]
K.J. Yeah

3'24" K.J. Did you ever find out *ah did ah* . . . Do you know what arrangements have been made about my vacation pay and my paycheck?
N.A. No, I can check *if* you want me to.
K.J. Yeah.
N.A. Do you want me to?
K.J. Yeah. Because *ah with her coming home* (U.I.) . . . I have I have absolutely *not discussed it with* (U.I.). She may very well . . . I talked to

Dr. Shore [spelling] today. She may very well be home by (Noise obscures voice)

N.A. *Okay.*

3'49" K.J. And my mother will be coming out *because the first thing she wants to do is come and visit* and help with the baby . . .

N.A. Okay . . .

K.J. . . . (U.I.) and I can hardly have her out here without . . . you know (U.I.) (Noise interferes).

4'00" *N.A. Right.*

K.J. Because Luis is *going there* on Friday. Most of my personal mail is still going to be coming to the office this week. *If my family writes . . . have any address or any other instructions to accept my mail.* And Luis talked to Jackie this morning (U.I.). Please give it to Jackie and I'll pick it up on Friday. (U.I.)

4'22" N.A. *Okay. Ah . . .* (U.I.) *he asked about you working at home . . .* (U.I.)

K.J. I really think this was the atmosphere (U.I.), *surprised by* my attitude towards the firm. *I've been very negative. I mean there have been things you said* aggravated the hell out of me.

N.A. Yes. I've never noticed that at all. You've always been so good . . .

K.J. You caught me at the right time. *You always caught me at the right time.*

N.A. Yes but there's been more than one time.

F.H. [Chuckling]

4'48" K.J. *Well you . . .* Besides, I know nobody takes me seriously anymore. But I really am . . . going to go to Houston one of these days . . . I really . . . *it's been two years* now I've been talking about it. But I just think I need a change of pace.

And maybe . . . Oh, by the way—do you know what Roxanne's salary—*talking about* (U.I.) she just got a raise of—she got a raise of *forty dollars* (sounds like) a month.

N.A. Great.

K.J. She's making *three one sixty* a month. The reason for that is, they anticipate next year and the year after, making even more money that they

5'20" did this year; and the (U.I.) *probably said*—give all your girls a thousand dollars a month raise because the government will just take it all.

N.A. Right.

K.J. So . . . I have never heard . . . Their receptionist makes more than our top secretary (U.I.) . . . you know *sticking* (U.I.) the money and (U.I.). And they're remodeling again.

N.A. *That's a wealthy* firm.

K.J. Oh my God, yes.

N.A. Is it (U.I.).

K.J. (U.I.).

N.A. They don't have tough cases like we do.

K.J. Yeah.

N.A. (U.I.)

5'42" K.J. Also, they don't have to solicit cases or wait for a case to be *referred*. Everybody knows this. If somebody gets run over by a train . . . *ah they call Pete Jamail* (phonetic) (U.I.). *That's why he's famous.*

N.A. Ah maybe you can get back in there?

K.J. I won't work any more for any law firm. I would rather work for a firm where I can use my Spanish and get all the secretarial work—somehow, *eventually.* Like a job with John Reeves' (phonetic) office (U.I.).

M (U.I.).

6'10" K.J. As a matter of fact, John called me at the hospital—he left a message—I wasn't there. And when I tried to call him back, he was out of his office.

K.J. But, ah . . . I may take *some time* (U.I.) *at the State of Texas.*

N.A. Ah yeah (U.I.).

K.J. Well the thing is that to be a secretary, you die a little bit every day. You *are going to have to* (U.I.) you use *only* your fingers and you *don't* . . . I mean you don't develop. You'll *never get* anything (U.I.) unless you try. *So* [Pause] Why *did you* (U.I.) *did John ask you to* (U.I.)?

N.A. (U.I.).

K.J. [Chuckling]

F.H. Yes. Well I had—I had one. I mean I . . .

K.J. Maybe I should be.

N.A. Oh, you'd probably be better organized.

7'00" [Pause]

7'06" K.J. Actually, I should have quit several months ago because I was just increasingly unhappy and I didn't want to work anymore.

N.A. Yes. (U.I.) I myself strongly believe that your dissatisfaction *for* whatever it is *you thought, you know*, is completely exaggerated.

7'25" K.J. Well, I don't know. *There are things* that irritated the hell out of me—the smallest teeny, tiny things.

7'30" [Knock on door]

K.J. Come in, come in.

N.A. Wait.

M (Voice from door) (U.I.)

K.J. Just a moment.

M (U.I.).

K.J. Hi. I have two unexpected visitors here.

M Ah, okay. Alright I'll talk to you later. [Male with deep voice.]

K.J. No problem.

M See you Luis.

K.J. One of the things that was driving me crazy was that *ah* Davidia was lording it over me. "Oh, I make more money than you do and I have better parking arrangements than you do and I'm more valuable to the firm." And I thought well, Jesus Christ—you know—there was one parking spot, a $100-$115 a month. And that was . . . *What really got to me* at this time I'd walked four blocks in the morning and I'd say boy—they take better care of *the new* (U.I.). But I think Davidia is our newest secretary—if I'm not mistaken. And I just *thought* that well, what the hell. *You know, what do* I . . . I should *have* quit *months ago* because

8'10" I was unhappy. I felt that the firm was . . . (U.I.) And . . . *I'm* just unhappy. *I quit a long time ago and not let things come (U.I.).*

N.A. I *personally* don't have any idea what she (U.I.).

K.J. Oh yes she is. She's paid . . . Davidia is being paid more that I. *She's paid.* And so when I would ask her to help or something, *her attitude*—you know, off the record, would be you should be helping me. You know . . .

8'37" N.A. Did she tell you what she was (U.I.)?

K.J. Yeah. She was *dancing up and down happy.* She said that Michael Dan had personally authorized it. And I was sitting at my desk just a couple of weeks ago when Michael asked her "Did your raise come through?" You know, "Did you get it

in your last paycheck?" And Davida was *very upset* because no it wasn't. He said "I'll tell Jean right now. I'm sorry, it slipped my mind. (U.I.)." He gave her $100 a month raise (U.I.).

N.A. (U.I.)

9'00" K.J. And it was just little things like that, like ah . . . My unhappiness was not just related, you know, to this latest incident. It went way back. *And you know, I guess* that hostility just carries over.

9'14" And so now, when Jim Butler *told* me on the phone this morning *that* he wanted me to come into the office—what was the big hurry? I was trying to breast feed my baby. I was trying *to teach 'em to suck and* swallow—and to be called away from that to go to the telephone because Jim Butler wants me to come to the office right now—my attitude is, I don't *really want to stay.* I was *really* angry *about* that. I *mean* his timing, unfortunately, was very bad.

N.A. (U.I.)

K.J. OK. And the fact that this problem follows me to the Intensive Care Unit of the Hospital and pops up at my house in the middle of the night. I am not exaggerating when I say—like *my* when George Barnes . . . Look . . . Look, I got the message at the Hospital today (U.I.). Round the clock harassment. And ah *ah* . . . What could I say. I'm telling you what I told George *just an hour* ago *he was by.* And I said look, I'm going to go see this lawyer tomorrow. I *rather than* call and cancel and not go. You know *what—I'm then going* I'm going to ask him to get some kind of restraining order to keep everybody away from me until at least my little girl gets out of the hospital because right now I'm under all this pressure.

N.A. Yes.

10'10" K.J. And these people were this and those people were that and . . . Well some of the conversation going around about money is, you know, very lucrative. I'm thinking to myself, Jesus Christ, you know, this is not my fight. This is your fight and this is her fight. It's not my fight. There's nothing . . . I have nothing to gain by getting . . .

N.A. (U.I.)

K.J. As I said to you two, a position between two opposing *fissions* (phonetic).

F.H. You know . . . I . . .

K.J. It's not my fight.

F.H. *Nick . . . You know I . . . I . . .* I haven't heard all of this before. And ah, I'm here because—for two reasons. And I think I could explain [*laughing*]. *Walking in on you* unexpectedly.

10'44" K.J. I like *having* the company around.

F.H. Well first of all, I heard *basically* what was coming down and it sounded pretty bizarre, you know. But the main thing is *to protect* . . . The main thing that disturbed me was the fact that . . . I personally always liked you. I mean we just have a light, pleasant relationship and everything that I ever wanted done was done

11'11" perfectly. And I haven't really heard about all these other problems. But hearing them now and hearing secondhand what has come out in the last couple of days *and*—last week, *ah* made me realize that things should be *able to be* a lot better for you now that you are having a little child coming home from the hospital. And I happened to have had personal experience in the kind of tactic

11′45″ and the kinds of things that started this whole thing going and I just thought I'd throw my two cents in (*U.I.*). It could be very uncomfortable for you and I would like to assist you in any way that I could to keep you from being pestered and harassed. And so that they don't feel that there is something that they'd like to either get from you or threaten you about, *alright. And this is* . . . This to me, I think, is the most *indecent* and cruel thing to do to someone with all the other pressures you've got, especially coming from the hospital. I've seen this before.

12′37″ K.J. I've *never experienced*, you know . . .

F.H. I've seen it with witnesses. You know. And I've seen it with people basically in a situation where there's a lot *at stake*.

K.J. There's a lot *at stake* for them, *that's true*. But not for me.

F.H. *You know* . . .

12′50″ K.J. You know, some of the things he pulled trying to ingratiate himself backfired. Like he'll walk around here and he'll say Jesus look how you live (*U.I.*). My God *bring* a little baby into this. You know they don't take care of you. His answer is—we'll take care of you. And we'll—we'll right all these wrongs. And I'm thinking to myself but he doesn't know I live like this because I chose to and *I didn't have the* money.

F.H. Yes.

13′11″ K.J. I gave up an extremely good relationship because I would rather be the wife of a poor man than the girlfriend of a rich man. Now he doesn't have any of his background. I'm in this situation because I put myself in this situation.

F.H. Yes. Yes.

K.J. All he looks at is oh look at how terribly you live; and oh you poor woman, *oh you poor* . . .

we can't let your little girl come into this situation. We'll find a beautiful apartment for you [*chuckling while saying this*].

F.H. Yes.

13′31″ K.J. And it's really funny—because he's spending somebody else's money. What does he care? You know. I'm sure that one of the reasons he's coming to see me day and night is because he's *billing* by the hour. And he's going to be here as much as he can and is . . . because he's building up [garbled] bill. [*Chuckling through this statement.*]

F.H. Honestly, does he still have any reasons to feel this—this idea that somehow *ah* you know or you said that Mrs. Koller talked to you?

13′59″ K.J. No, he wants me . . . *He will bet on* somebody to say it. They don't *give a hoot*.

F.H. *Yes. I want to hear* . . .

K.J. They want . . .

F.H. I want to hear . . . I'm very curious.

K.J. They want someone to recall a conversation with Mrs. Koller that she never took Bendectin during that first trimester. You know, that she may have taken aspirin, or whatever the hell. I don't know. I wasn't involved then. But they have a transcript of *the* alleged conversation that they *want*. You know. "Do you remember? Think about a little more *of the* conversation." That type of thing.

14′28″ F.H. Well what do you think about that—*that* they say they have *some transcript*.

K.J. Well that's criminal fraud. I mean if somebody actually said that . . .

F.H. Yeah.

K.J. *And was (U.I.)* . . . I don't know, *I don't (U.I.)*.

F.H. Did you ever talk to Mrs. Koller?

K.J. Well I've talked to her, but only, you know, to ask her if she wanted coffee and ah, you know, get her on the telephone for Nick Allis (*phonetic*).

F.H. *Did she have* . . . Did she ever mention to you anything about the *pill* or the Bendectin?

14'50" K.J. I have no trouble *with* making a statement to that effect. You know. The only *contact I would've had* with Mrs. Koller, personal contacts, they don't even know about is because it never came up in the conversation. I had sent her a book called "How to Raise a *Retarded* Child", and said look, I had a little girl once and this book was tremendously interesting to me. You have so many children, *(U.I.). Or something to that effect.* I think there's a copy of that in a green book *(U.I.).* It just . . . It just so happens that I have never been asked by anybody had you

15'21" ever had a personal friendship or personal relationship . . . This . . . This was a year ago. This was a long time ago.

F.H. Yes.

K.J. And I specifically didn't mention that to them because they said to me, you know, what's been the extent of relationship with Mrs. Koller (phonetic)? I specifically didn't mention that because then they'd *jump up* and say ah ha—she was a personal friend of yours and may have confided in you.

15'36" *F.H. Yes.*

K.J. So I didn't mention that at all. You know ah . . . by omission *I left (U.I.) it out.*

F.H. Yes.

K.J. . . . *as not relevant [sounds like].* So . . . I told George today—I said look if this . . . if this harassment *is going to continue*, I am going to go see that lawyer tomorrow. They arranged for

me to see some kind of a lawyer for me to talk to.

F.H. Yes.

K.J. Um—Carl *Stuck* (phonetic)?

F.H. Um hum.

15'58" K.J. And I said look maybe he can do just one thing for me—two things. Maybe he can get some kind of restraining order so that nobody comes to see me or at least

16'04" don't come to see me at the hospital. And so I can get my paycheck and go away. I want to go far away—go to Chicago, go to Mexico, you know. Ah I don't want to. I don't want to be vulnerable to these kinds of harassments.

16'15" F.H. Yes, yes. Well when you ever talk to any of *(U.I.)* these guys . . . Especially at the hospital . . . It must have put you in a . . . *(U.I.).*

K.J. Well it's embarassing because, you know, everybody in the hospital knows me. You know, it's not . . . it's not nice to have people see me . . . and you know, all this personal *stuff is infringing* . . . all these calls that come to the hospital.

16'34" *F.H. Yes.*

K.J. I mean not that there's so many calls. But that's a very busy critical *period*. You know, that's not, you know, for personal phone calls. Um . . . (U.I.).

F.H. Yes, Yes. But there's just plain no truth in that kind of . . . *(U.I.).*

K.J. *(U.I.) I have a . . . Oh, it's not important though.* No there isn't . . . but they want to find someone that they can use as a ah . . .

16'58" someone that they can as a ah . . . someone . . . something they can show to the Judge because they have no case—*okay*—in the Bendectin matter.

F.H. *Yes.*
K.J. And they're trying to . . .
F.H. *Okay.* How can we help you? How can we help you ah . . . prove to them or . . . or clear you of this harassment? I think that we should . . . I
F.H. feel, frankly, (U.I.) . . . I feel that we should do something to protect you and to . . . ah . . . and to see to it that you're not harassed. I think that whoever . . .
17'28" K.J. The only reason they're harassing me (U.I.) I'm sitting there, you know, they can come to my door. *Whenever* I'm at the hospital—they can stand in front of the hospital door *and wait for me.* Okay? *I wanted* . . . That was the specific reason I told Richard yesterday—please get my paycheck and get my vacation pay [smacking fist]. I am leaving. I don't know whether I'm going to go to Houston or go to Mexico. I just want to go away because it's not my fight. And I don't feel kindly disposed towards your *lawsuit.* I know I just . . . The hell with it. I want to leave.

17'54" F.H. Well you're very honest and you are entitled to your *feelings. You know what Nick? I left my keys (U.I.)* [Sounds like coins dropping on the table].
(U.I.) *Back in a minute.*
K.J. *Okay.*
F.H. *(U.I.) I know I . . . (U.I.). Well . . .*
(U.I.) I'll be right back. Can I open this?

18'19" K.J. *Yeah*—just . . . inside the handle—you have to reach inward—that little round bar—the round little . . . no all the way down on the bottom. *No* the round doorknob . . .
F.H This one?
K.J. No . . .
F.H. This one.

K.J. . . . no, all the way down. Reach all the way in. *Do you see where the metal thing is?*
F.H. *Not yet.*
K.J. *You* turn that.

18'36" F.H. Oh. Thanks. [*Chuckles*]
(Sounds of walking, street noises and sounds of tape recorder being handled).

19'21" Recording terminates.
(This is the end of the first recording, the time on the cassette copy is irrelevant as it would not directly relate to the time of the stopping of one recording and the start of the second recording).

(SECOND RECORDING)

0'00" Start of recording (pulse sound)
(Sounds of walking and movement)

0'08" *Sound of knock on door.*
K.J. . . . *(U.I.) through the law. I kind of felt like my name (U.I.).* And the firm has more than enough money (U.I.) to *hire* more temporary secretaries. (U.I.), you know, fair at all. *And so, now that I'm being approached by these people,* ah I'm not particularly inclined to not listen to what they've got to say at all for the simple reason that I'm very hostile towards the firm. I told that to George earlier this evening. *He came to see me. I said look* I'm not (U.I.) *hostile,* I'm hateful and angry. And I'll go on the record as saying I'm hostile and hateful and angry. So what good am I to you? I'm . . . I'm biased. *I'm (U.I.). You know* . . . And that's documentable. He doesn't care. They don't *care.*

0'59" F.H. Yes.
K.J. *[Pause] That's all they are interested in?*
M *Yeah.*
K.J. *Soap opera.*

N.A. *One part that I couldn't you know lose sight of (U.I.) that I certainly appreciate use in the beginning (U.I.) so to speak . . . (U.I.). Don't you feel we are?*

1'24" K.J. Yes, that's why I liked working for you. It was like working for Robin Hood. You know, *ah* rescue little people who are being trampled by big people.

N.A. Yes.

K.J. Yes.

N.A. (U.I.) That's why . . . I . . . I never asked you to (U.I.) . . . appreciate it (U.I.). But . . . To me . . . and so I'm trying to encourage . . . I'm a little bewildered by the resentment that you have against our firm. (U.I.). But to me, that is something aside and apart from the rights of somebody who is going (U.I.).

K.J. Yes.

2'25" N.A. *(U.I.). I would would assume that you would agree with that. (U.I.) you know, (U.I.). That's all we are trying to do* as far as I can see. *How do you see it?*

2'50" K.J. *Ah*, as I see it, *ah this is (U.I.)* problem *hand in hand (U.I.).*

N.A. Of course.

K.J. Apparently they asked *you to check with (U.I.)*, see if she—or who is she? Who really is she? *Do you think she (U.I.)?* Background checks. *This* background check and comes up with all this tremendous information. And *ah* then we . . . Apparently has himself *blown this up* to be . . . hey—this girl could be a key witness. All he's trying to do *is fatten (noise, his fee, I think.*

3'20" K.J. *He's here around the clock!* I'll go to the hospital in the morning and I think I see him, you know, the guy slips behind the building [chuckles]. *Now am I imagining this*—am I paranoid . . . *Is* the guy actually following me around day and night? And *ah* . . . as I said—he was here ten days to two weeks ago. He knocked on my . . . first time I ever saw him in my life. He knocked on my door and asked for somebody. I don't remember their name—John Smith, Frank Doe—who used to live here, *(U.I.)*. How long have you been here, how long ago have (U.I.). *You know* I'm answering his questions. He says well where do I get more information about a former tenant. *If I want some information about a tenant,* who do I talk to? And I told him who to talk to *[chuckling]*. So naturally he went right down and got all kinds of information from, you know, the landlord who lives right next door.

3'58" K.J. I'm sure that's what he did 'cause he asked me—where do I get information *about—a former tenant . . .*

F.H. Yes.

K.J. And the next time I saw him, he popped up here at my door, and that was on . . . Thursday night or Friday night . . . ah with Pat Ryan. And Pat Ryan

4'13" I recognized immediately. He introduced himself. He said this . . . I'm so and so, here's my card, and here's Pat, my associate. And I looked at Pat Ryan and I thought—you know, I (U.I.) my eyes. He looked pretty familiar. Then when he starts talking, I recognized his Oklahoma accent [?].

F.H. (U.I.).

4'33" K.J. *(U.I.) before*. But I guess, you know, *in* T-shirt and jeans, he probably figured he was very *different*.

N.A. Yeah.

F.H. *Nick, Nick*—I think that the one way that you are going to keep these guys from pestering you

and bothering you is to *declare* once and for all in the clearest, simplest way that you did not hear Mrs. Koller ever say that she didn't take Bendectin.

[N.B. —*THIS PHRASE JUST RECITED BY MR. HUMPHRIES WAS SPOKEN IN A VERY DELIBERATE MANNER.*]

5'04" K.J. I have never had any conversation with Mrs. Koller—other than would you like some coffee . . .

F.H. Alright, alright, right . . .

K.J. (U.I.).

F.H. But you see, at this point, they just . . . they still feel they've got a chance because of this hostility and they want to manipulate . . .

5'19" K.J. Plus the fact that I'm not on record to the contrary.

F.H. That's what I'm saying. And because . . . As long as you're not on record *to the contrary*, there's room for manipulation and there's room to make money by putting in more hours—right?

5'31" K.J. Yes.

F.H. Okay. Well . . . You know . . . I just feel, you know that ah if you could, in a simple way, in . . . in language that you accept, just state that one simple fact. Basically . . . Ah, then they're going to figure . . . they're going to fold up their tent and go home, you know.

K.J. Um hum.

6'0" F.H. Because . . . there's nothing more in it for them. And I'll tell you something else. *Let them object* (U.I.) . . . Let them *try to* intimidate you.

K.J. They're *never* trying to be friendly.

F.H. No. Well you see, there is two sides—there's the . . . there's the velvet glove *and there's the* . . .

K.J. . . . and the carrot and the stick.

F.H. and the mailed fist.

K.J. Uh huh.

6'20" F.H. The mailed fist is what is implied. Why would they want to bring up to you a . . . *copy* [sounds like] [of a] birth certificate? Why would they want to mention to you past records which we *certainly don't* (U.I.).

K.J. I do not understand that. I wish I knew (*U.I.*) *go ahead.*

F.H. Look, ah . . . Let me . . . This is where I come in . . . .

K.J. Why would they go to the extent of photographing her *birth certificate*?

6'38" F.H. Krys, Krys. This is where I come in. Okay. This is what really made me furious, frankly, and I said at the time—I've got to talk to Krys and tell her that, um, this is just the beginning. This is just the beginning. If they feel as though they can threaten you, they'll keep you in a state of nervous tension and stress. And I'm saying to you that what's past is past, especially as far as the firm is concerned and the record is there for anybody to look at. I don't know what it is and I don't care. I've got a (U.I.) *of the* record myself, *whatever* but . . . *ah* I'm just saying that . . . that there's no need for you to have to put up with this. You know . . . I mean wouldn't you want it that way?

7'30" K.J. Yes. The only thing that they're interested in is getting a statement from someone (*U.I.*) that

7'36" (Drop out—possible break in recording) Koller said. I think *that they* . . .

F.H. Alright.

K.J. . . . that they have no case unless they can get someone . . .

F.H. *Alright* . . .

K.J. . . . to refute what Mrs. Koller is stating in front of the jury. I don't know, maybe . . .

F.H. That's true . . .

K.J. . . . *this is the only possible* . . .

F.H. I agree with you. I agree with it. I agree with you. And by the same token, if you were willing to sign a simple statement, you know, saying that what they're trying to put into your mouth isn't true, you know. And it doesn't in any way ally you with this firm. It simply is a selfish act on your part . . .

K.J. Yes.

F.H. . . . to avoid this continual, *ah*, unpleasantness.

8'17" (click click sound)

K.J. Um hum. I have no quarrel with that, you know—bring *me* or send me such a statement or pull it out of your jacket pocket by coincidence—I have no problem . . .

8'25" F.H. Krys, *Krys (U.I.)* . . .
[*Janowski chuckling.*]

F.H. . . . *you know something—you'd make a good (U.I.)*
[*Janowski laughing most heartily!*]

F.H. Pull it out Nick! [*Humphries chuckling*] *By golly it just so happens!* . . .

F.H. Just pull it out!
[*Loud laughter*]

K.J. This saves me the trouble of typing *one* up myself.

F.H. Now, *what do you want to do*?

N.A. You . . . *You tell me—you might want to cross* . . .

K.J. . . . cross . . . I have to cross something out to look like I did something . . .

F.H. T h a a t' s right! You understand. You understand! *See* . . .

K.J. It's much easier than making a lot of notes—don't you think? [*Laughter*]

8'50" N.A. Well, no. I *prefer* a little longer, more detailed thorough job *than (U.I.)* would.
(U.I.) . . .

K.J. *Okay.* That's the copy for me? I don't need a copy. [Pause] um . . . Matter of fact, I talked to my doctor about this last week, how upset I was *since* I quit my job. I felt (U.I.) of my life and (U.I.). And he told me to quit my job *and not to make an issue of it. He didn't (U.I.).*

9'22" F.H. We're not here to talk you out of any of your feelings, Krys—absolutely not. Right Nick? I don't think that's . . . that's our part, you know.

N.A. You're entitled to your feelings . . .
(Both Allis and Humphries talking at the same time. U.I.)

F.H. That's the truth.

9'45" K.J. This is true. They've been making tremendous promises about relocating me within twenty-four hours *and make it sound* it sounds to me like a . . . A plane would be chartered to fly me away that would . . . to sunny climes, or whatever. Really, it's been quite flattering. I've never had such attention. [Chuckling.]

10'03" *F.H. It makes you think that you were (U.I.)* . . .
[*All three chuckling and talking together.*]

K.J. It would have been fun to see what they were willing to pay for that statement. I mean, just for the hell of it!

10'11" F.H. Yes.

K.J. *He probably* . . . If somebody said I'll sign for $50,000 and *he would have asked his employers* for $100,000 *and kept half* . . . *No question about it*. [Pause—16 seconds.] They misspelled remuneration. No one will ever know *I never use that word.*

N.A. *I don't have (U.I.)*

K.J. [Chuckling] That was one of the reasons for my hostility, was that I felt that Sandra had been hired to replace me.

N.A. No, . . .

K.J. *No?*

N.A. . . . we needed *that new* secretary. I would never have Sandy as a secretary (U.I.) *she's such a poor speller. I don't know if you have noticed that, but . . .*

11'05" K.J. Um . . . Actually, no I didn't, *but* she's ah . . . She's made a . . . She's a very, very hard worker.

N.A. *She's a hard worker, yes.*

F.H. *Oh, I know . . .*

N.A. *(U.I.) yeah.*

K.J. Floyd, could you just hand me my purse over there.

11'20" N.A. *I didn't believe . . .* The reason that I didn't have you take over that motion was I knew that you had *had* a late night (U.I.), *baby. I wouldn't want to get you involved in a situation where you (U.I.).*

K.J. *Um hum.*

11'33" N.A. In addition, however, *although* you seem to think that it was *un*important. But that was very important to me in getting that booklet (U.I.) out and not worrying about it. *(U.I.). I wanted to give that (U.I.) to somebody who could do it and I wouldn't have to worry about it (U.I.).*

K.J. *That's the one that (U.I.) subpoena?*

12'00" N.A. No, no. I'm talking about the . . . Remember the booklet *where you contacted the (U.I.)?*

K.J. *Oh yes.*

N.A. *(U.I.)*

K.J. I understand (U.I.) . . .

N.A. Yes, I guess I feel bad for not being sensitive enough to your feelings about that; *that I, myself, was being protective at this point of (U.I.). I just . . .*

12'32" K.J. *Well I had a . . .*

N.A. *. . . I would really like . . . respect. I just want to (U.I.).*

12'37" K.J. Remember that one Friday I left because, I told you, I had to go to the hospital and I left. And you tried to reach me that Friday because you didn't find some of the things . . .

N.A. *We just wanted to get the . . .*

12'47" K.J. . . . you couldn't find the files, and you called the hospital and I wasn't at the hospital. The reason for that is, I collect my breast milk during the day and ah . . . Well when I was working I took *it out to* the hospital (U.I.) *need it*. That day, when I left the office—I left the office at 5:45. Luis, my roommate, *has been* madder than hell that I had been tied up 45 minutes. Before he used to fight with me because [quote] Nick Allis was more important that I am—*you stay for him* (U.I.). Now, he was fighting with me because Nick Allis is more important than the baby is. Well push came to shove. When we were driving out of the garage of the hotel, he took the baby milk, that I had saved during the day, and he says you think after waiting for you all day that now I'm going to take you to the hospital and wait some more? And he threw *the milk* out the window. And I got hysterical and started crying and he took me home and we had a big fight. But that's why I ran out of there in a hurry to go to the hospital, and you called the hospital and I wasn't there. I wasn't lying to you when I said I . . .

13′32″ *N.A.* *No, I didn't think so . . .*
K.J. You know, but I mean . . . I have been having tremendous conflict *about this.*

13′40″ N.A. (U.I.) That's why I'm sorry we have this tremendous case come up just at this particular time . . . *And ah* . . . [10 second pause]. (U.I.)
K. J. Um. [Pause] *(U.I.) speak to (U.I.).*
M *Chuckles.*
[Pause—17 seconds. Footsteps, sound of chair moving and papers being shuffled. More footsteps. *This goes on for about 40 seconds.*]

15′23″ *F.H.* *Damn, I thought (U.I.).*
K.J. *[Chuckling.]*
N.A. *(U.I.).*
F.H. *[Chuckling.]*
[Pause—16 seconds.]

15′41″ *K.J.* *I don't even know what today's date is.*
N.A. *The 27th.*

15′49″ K.J. I don't need a copy of this *'cause I'm* (U.I.).
[?] No.
[Pause—10 seconds. Sounds of footsteps.]

16′02″ K.J. This is not relating to any ah . . . remuneration. But I would like them to have my check and my paycheck for Luis on Friday. It's pretty important to me.
N.A. *I don't think it's any problem at all.*
K.J. Well *our* whole budget was planned around my . . .

16′15″ *F.H.* *Yes.*
N.A. *Yes.*
K.J. . . . paycheck being on that day.
N.A. *Yes. But ah . . . [pause] . . .*
[Sounds like briefcase being opened or closed.]

16′26″ K.J. As a matter of fact, I even considered getting myself fired by just, you know, wiping things off

my S-20 machine. Ah, I didn't want to quit. You know, *it's terrible enough to be a quitter.* Why should I quit. Let 'em fire me. I've had that attitude *for weeks which I can't quite explain.*
[Pause—9 seconds]

16′50″ K.J. These people aren't going to stop at this. They're going to go to try to find somebody else.
[?] *Yes.*
K.J. *You think it makes* any difference to them who they get.
F.H. I agree with you.
N.A. *(U.I.).*
[Pause]

17′03″ K.J. . . . it seems awfully short, *it seems to (U.I.).*
N.A. *Yes (U.I.). I think (U.I.). If you want to make it stronger or* (U.I.).
[Movement about room]

17′36″ (Sudden increase in sound level of recording)
K.J. . . . *(U.I.). The thing is (U.I.). Hey,* you've already *(U.I.). You've already copied (U.I.)*
. . . you've already (U.I.)

17′43″ Recording terminates.

BIOGRAPHICAL DATA

William E. Harward, Jr.
Consultant
3507 Charleson Street
Annandale, Virginia

GENERAL BACKGROUND

Mr. Harward retired as a Chief of the Engineering Section of the FBI on May 13, 1977. After over 26 years serving as Special Agent he is now self-employed as a forensic and security consultant, Annandale, Virginia. He is married and has four children.

He served in the Engineering Section of the FBI Laboratory from 1961 to his retirement and has received numerous commendations and awards for outstanding performance.

Prior to 1961 he served as a Special Agent in New Orleans, Boston and Washington, D.C. handling a wide range of investigative assignments in both criminal and security investigations. He entered the FBI as a Special Agent in 1951.

EDUCATION

Mr. Harward was trained in electrical engineering for three years at Cornell and Northwestern while in the U.S. Navy V-12 program. He was commissioned after graduating from the U.S. Naval Reserve Midshipman's School at Columbia University, New York. He has received a B.S. in Mathematics from Wilson Teachers College, Washington, D.C., and an M.S. in Forensic Science from George Washington University, Washington, D.C. In addition to various in-service and specialized training programs within the FBI, Mr. Harward has taken courses in electronics and psychology at the U.S. Department of Agriculture Graduate School, self-study courses in integrated circuits, technical and integrated security, locksmith and alarm system courses offered by the Associated Locksmiths of America.

FORENSIC BACKGROUND

Mr. Harward has worked for over fifteen years in the fields of electronics and acoustics while assigned to the FBI Laboratory.

He conducted examinations in research relating to magnetic tape recordings, speech characteristics and acoustic phenomena, various electro-mechanical, telephonic, toll fraud and audio interception devices. He pioneered in the FBI Laboratory the application of the sound spectrograph and spectral analysis techniques to forensic problems of speech analysis, speaker identification, and analysis of tape recordings. He has conducted hundreds of examinations of evidence submitted in criminal investigations in the above fields.

He has testified as an expert witness in state and federal courts in California, Georgia, Indiana, Louisiana, Mississippi, Pennsylvania, South Carolina, Texas, Virginia, West Virginia, and Wisconsin. He has been accepted as an expert in the fields of acoustic, audio, electronic and engineering analysis. He served as a scientific consultant to the National Commission for the Review of Federal and State Laws Relating to Wire Tapping and Electronic Surveillance (Commission Studies, April 1976). He is a member of the Audio Engineering Society, the American Society for Industrial Security and the Association of Locksmiths of America.

Letter of Ogden N. Lewis to The Honorable Norma Holloway Johnson Dated June 9, 1983

DAVIS POLK & WARDWELL
1575 I Street, N.W.
Washington, D.C. 20005
202-789-7100

(Letterhead Abreviated in Printing)

June 9, 1983

Honorable Norma Holloway Johnson
United States District Judge
United States Courthouse
Third Street and Constitution Avenue, N.W.
Washington, D.C. 20001

Dear Judge Johnson:

Today Merrell Dow Pharmaceuticals Inc. announced that it will stop production of Bendectin. It reached this decision for non-medical reasons. It will continue the availability of the drug for patients already using it.

The defendant has authorized me to communicate this information to you and to plaintiffs' counsel in this case. I enclose

herewith a copy of the intended news release and the documents which will accompany it.

Respectfully yours,

/s/ OGDEN N. LEWIS
Ogden N. Lewis

Encls.

cc: James G. Butler, Esq.
Allen T. Eaton, Esq.
Wiley A. Branton, Jr., Esq.
Jacob A. Stein, Esq.
Cohen & Kokus

News Release Annexed to Letter of Ogden N. Lewis Dated June 9, 1983

Merrell Dow

MERRELL DOW PHARMACEUTICALS INC.
Subsidiary of The Dow Chemical Company
Cincinnati, Ohio 45215, U.S.A.

Telephone: (513)948-9111
Telex: 214320

NEWS RELEASE

FOR IMMEDIATE RELEASE:

CONTACT: Bill Donaldson
(513)-948-7859
(513)-561-8721

WASHINGTON, D.C., JUNE 9, 1983—The production of Bendectin, the only U.S. approved drug for relief of nausea and vomiting of pregnancy, has ceased in the United States of America and world-wide according to its maker, Merrell Dow Pharmaceuticals Inc.

David B. Sharrock, President of Merrell Dow Pharmaceuticals—U.S.A., (an operating unit of Merrell Dow Pharmaceuticals Inc.) today emphasized to a Washington, D. C. press conference that, "patients who have taken or are taking Bendectin during a current pregnancy should not be alarmed by our action." In explaining that the company's action was based solely on non-medical reasons, he described a national information system instituted for physicians and pharmacists to receive information which will help them answer inquiries from patients.

Merrell Dow is stopping production, "with great reluctance," Sharrock said. Bendectin has been, "tested extensively and used safely for 27 years in more than 33 million pregnancies. The overwhelming majority of independent experts, plus regulatory and health agencies throughout the world agree that the available medical evidence does not demonstrate a cause and effect relationship between the use of Bendectin and birth defects." He commented further that in spite of this support, significant adverse publicity has continued to surround the product.

Sharrock added that Bendectin is, "a victim of these litigious times. Although we have absolutely no doubt of its safety and effectiveness, the burdens of continuing to market Bendectin have become just too heavy. Unfortunately, these burdens have fallen on physicians, pharmacists, and patients, in addition to the company."

The defense of Bendectin has caused a significant drain on the manpower and other resources of the company. "If Merrell Dow is to continue to pursue its mission—the development of new and improved drugs for patients here and around the world—we must, sadly, stop production of Bendectin," Sharrock said.

Reflecting its concern for the impact of this decision upon patients who have taken or are taking Bendectin for current pregnancies, Merrell Dow has instituted a three-part program.

Effective today, the company is:

1. Advising physicians and pharmacists that patients now taking Bendectin can complete their therapy.

2. Advising customers that Merrell Dow will offer a program for handling unused stocks of Bendectin.
3. Answering all physician and pharmacist questions via a toll-free information number.

Approved in the U.S. in 1956, Bendectin is the most tested drug for use in pregnant women.

In 1980, a U.S. Food and Drug Administration's panel of experts, the Fertility and Maternal Health Drugs Advisory Committee, concluded that present evidence does not demonstrate an association between Bendectin and an increased risk of human birth defects.

"I think there is a lesson in this for all of us," Sharrock concluded. "America is a litigious society. Unfortunately, consumers—the ultimate beneficiaries of drugs—will increasingly see the real cost of defending products against unsubstantiated claims. In fact, as in the case of Bendectin, such claims can ultimately deny the public use of needed therapy."

Excerpts from United States District Court for the District of Columbia Order To Show Cause Hearing Transcript of June 21, 1983

[11] * * * * THE COURT: Well, let me say before you get off this matter, you are certainly entitled to your views on that, but I still am firmly of the opinion that her credibility is not **[12]** at issue here, but you are certainly welcome to bring her.

Now, I think the defendant would like to say something about the motion, and let me hear that before we get to your next point.

MR. STEIN: Before I leave that point—

THE COURT: You are still on that point, okay.

MR. STEIN: If it's your honor's resolution of this issue that her testimony is irrelevant, then we are bound by that.

THE COURT: Let me say this. I am not saying that her testimony is irrelevant. I don't know what you want to get from her, but I just said to you that with respect to your view

that the way I have framed this rule to show cause, the lady's credibility is at issue. I said I don't think her credibility is actually at issue, unless you bring her here and there is some issue of credibility. But I am concerned with why Mr. Allis did this act, not whether Mrs. Janowski was telling him the truth or not, but why he did what he did. * * * *

[15] THE COURT: * * * *

I can understand how you as counsel for the plaintiffs have had an opportunity to consider all of this, review all of this and come to those conclusions. But, as I said, I still believe, as I have maintained throughout these hearings that I have conducted on these side issues, as I choose to call them, that the issue of the credibility of Janowski is not before me. But, as I said, if you think and if it is your theory that her credibility is there and you want to put her on the witness stand, I would think that the way for you to do that is simply ask me to try to get her here. * * * *

[17] MR. COHEN: * * * *

For example, the request for Janowski, there were five days of cross-examination of Ms. Janowski by Mr. Stein's clients out in California. That record is part of this record. It could easily be transferred if it was relevant. It's not relevant.

Ms. Janowski has gone through seven-and-a-half days of under-oath testimony. And I just don't see, and Your Honor specifically stated, that her credibility is not relevant, because the effect of what Mr. Allis did was to destroy Ms. Janowski's credibility, regardless of the truth or falsity of the statement, and it was to prevent this Court from following up and ascertaining whether the statement was true. That is the issue. The issue isn't whether what she said was true. The issue is when a witness has something to divulge in a **[18]** court proceeding, no one has the right to suppress that, whether she's telling the truth or not, and you have told that to Mr. Stein and his clients on at least five or six different occasions and they keep coming back and they keep saying her credibility is the key to this. * * * *

[30] * * * * MR. STEIN: I wonder if it would be possible for the defendants to advise the Court whether they intend when this **[31]** case is tried to call Ms. Janowski.

MR. WALSH: Your Honor, I can speak to that because I've given it a lot of thought. I simply don't know. It's perfectly clear to me what's going on. The plaintiffs deposed her at great length and took her through all of her problems on the deposition. They have done the same thing and just finished yesterday in the unemployment insurance hearing in the dispute over her unemployment insurance claims. Mr. Dan has cross-examined her over the same material that Mr. Coleman took her through and had the advantage, of course, of Mr. Coleman's prior deposition to help him.

Now, this is going to be a third time, and by the time they get through cross-examining Ms. Janowski, whether he does it under direct and claims she's a hostile witness or whatever the format is, she is going to have been examined three times over this material, and it is impossible for me now to know what is going to be left. But as far as we are concerned, they began on the morning of the 27th to destroy Ms. Janowski's credibility and this is just a continuing effort. • • • •

Excerpts from United States District Court for the District of Columbia Order to Show Cause Hearing Transcript of June 30, 1983

[97] • • • •

NICHOLAS R. ALLIS, called as a witness by the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Stein

Q. Mr. Allis, are you admitted to the bar of this Court? A. Yes, I am.

Q. When were you admitted? A. I believe it was April 23, 1971. • • • •

[98] • • • • Q. In evaluating the statement, I'm going to ask you what weight you gave to the following items, all right? A. Yes.

Q. What weight did you give to Mr. Daum's statement? A. I gave it weight.

Q. To the factor of Barnes in the case? A. I gave it weight, because a rear admiral had filed an affidavit indicating that Mr. Barnes had in essence said that he would be willing to pay money to get Mr. McBride, Dr. McBride, one potential expert in Australia.

I also had information that Barnes had been rummaging around in court records of our experts in towns far away from Los Angeles.

So that the information that we had about Barnes led me to believe that he was capable of the type of activities that Ms. Janowski was describing.

[99] • • • • Q. What part did the statements of your client have in your evaluation? A. It played a great part in my evaluation.

Q. In what way? A. Mrs. Koller had testified several times about her **[100]** ingestion of Bendectin and had testified under oath. I knew that Mrs. Koller was an exceptional person who had gone through schools and colleges on scholarship and had risen to the rank of captain in the United States Army, had not just good but outstanding character and work recommendations in her military history, was head nurse of one of the entire wards at Walter Reed, was a devout Christian, was now working as a nurse at the City of Faith Hospital in Tulsa and very active in that particular religion that that hospital is associated with. She is a person of the utmost, highest character.

In addition to that, the medical records showed and contained an entry by a doctor. I believe his name was Dr. Hanson. That record on the day of the child's birth said that Mrs. Koller said the only thing she took during the first trimester was Bendectin.

It is ludicrous, in my mind, to think that a person would say that she took Bendectin during the first trimester on the day of her child's birth in contemplation of any lawsuit against the maker of that drug.

In addition, at the very end of the first trimester, she went in for her first private visit with a physician, with an obstetrician. That physician, Dr. Stone, has testified and before that had

said that when Mrs. Koller came in to see him for the first time, she was already taking Bendectin, and that's what he put down in his medical chart. **[101]** She was using Bendectin. He testified that she already was using it and had obtained it from another source. • • • •

[102] Q. What effect did it have on you that she stated that the other side had the floor plans to the firm and there was a question of whether the files were fireproof? A. I gave it great weight. I asked and talked about—with Mr. Butler on the 27th, Monday, about whether we should change the locks on our offices because they had the floor plans of our office and asked whether the files were fireproof. In fact, we did get a locksmith that Monday who changed all of the locks in the office.

I also talked with people in the office about whether we should make copies of all of our files and have them put in some safe place.

I did that because I believed Ms. Janowski, not a hundred percent, but I tended to believe her. I had no reason to doubt her, and my reaction was to on balance believe her and act on it.

I thought that this is another indication of what Barnes is doing. It seems in line with some of the activities we've heard about, although taking it a step further, going further. It seemed to me that it made her story about her being bribed and threatened to sign a false statement even more plausible. These were just steps in a line. They had floor plans. They asked whether our files were fireproof. They went on and actually tried to importune an employee of our office.

[105] • • • • Q. Why didn't you put in the statement that she had both communicated with Davis Polk and had also told them that the case was a fraud? A. I did not put that in the statement because she had denied that, and I assumed that since she had denied it, she wouldn't sign it. • • • •

[106] • • • • Q. After making your evaluations, what was your opinion **[107]** as to whether there was a basis for believing Ms. Janowski's statement that she signed? A. I believe that there was a good basis for believing it to be true, and Floyd

Humphries and I left her apartment thinking that everything she said was true.

Q. When did you receive the Davis Polk letter? A. Tuesday, the 28th. • • • •

[111] • • • • Q. Did she ever tell you during the month of December 1982 that Mr. Schuck was her lawyer? A. Durin the month of December?

Q. Yes. A. She never told me that Schuck was her lawyer. • • • •

[114] • • • • Q. Did you tell Ms. Janowski at her apartment that you were interested in and wanted a fuller statement?

A. I certainly did.

Q. Is that reflected on the tape? A. It is. • • • •

Cross-Examination by Mr. Cohen

[155] • • • • Q. Would Mr. Humphries also be mistaken if he testified under oath that the principal reason that you were going to Janowski's apartment that evening was to get a written retraction of what she had told Davis Polk? A. He would be mistaken, and he didn't—what he said was that it was more of an affirmation. That's what we were getting. But, of course, if our suspicions were in any way true, to that extent it would be a retraction. But as far as the topmost reasons why we went out there, they had nothing to do with a retraction. It was to get an affirmation of what she was saying. • • • •

[156] • • • • Q. And didn't you just state under oath that you got this statement and you didn't intend to give it to the Court? **[157]** A. That is correct.

Q. So, therefore, your statement wasn't for the purpose of reporting it to anyone, was it, sir, that signed statement you got from Janowski? A. My—I didn't even think when I got the statement whether or not it would one day end up being given to the Court or one day end up being introduced into evidence in any forum.

My thought when I got that—brought that statement out to Janowski, which was based on what she told me previously,

was simply to get on the record what she had been telling Mr. Daum and me, to see if she repeated that to Mr. Humphries. She did repeat in the presence of Mr. Humphries what she had told me previously and Mr. Daum previously. I wanted to get it on the record particularly if she went to Mexico, and, secondly, I wanted to see if she would sign it, because it would be a further indication that it was the truth.

In my experience, once in a while you will have a witness who will say something, but then when you present them with a statement and it's a more formal thing, they feel—all of a sudden they won't sign it.

So, the fact that she would sign it would be a further indication of its truthfulness to me. So, these are the paramount things that were in my mind when I went out to get the statement.

[175] • • • • A. I always thought that they were trying to bribe her and threaten her. The only thing I had a suspicion about was whether she had led them on. Even if she had led them on in some innocent way, it would be wrong for them to bribe and threaten her, which is what she said that they were doing.

So, I always believed that they were offering her things, offering her the comfortable apartment and to take care of the wants and needs of her child. That would be the way that I was thinking of it, not using the word "bribe," but offering her things and threatening her. • • • •

[176] • • • • Q. You didn't intend to share this statement, because I understood your testimony under oath was you did not intend to show this confirmation to anyone; is that correct? A. Well, what I—I wasn't thinking about how it would be used in the future, not that I was intending any particular **[177]** use of it. I was not intending any particular use of it. I wasn't thinking of what use I was going to put to it. I was hoping, I suppose, that now that she has come back to us and told us what the facts are and so forth, that in some way, shape or form this could come out and help Mrs. Koller. • • • •

DAVID AUSTERN, called as a witness by the plaintiffs, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Stein

[188] • • • • Q. Would you tell the court your background and training as a lawyer, with particular emphasis on matters dealing with ethical considerations. A. I graduated from law school in 1964. I spent three-and-a-half years as an assistant district attorney in the New York County District Attorney's office and five years as an assistant United States attorney thereafter in the United States Attorney's Office for the District of Columbia.

Q. Where did you graduate from law school? A. Yale. I spent slightly less than one year as a legal advisor for the mayor of the District of Columbia. I then served for about the same period of time as bar counsel to the Board on Professional Responsibility of the District of Columbia Bar, and I went into private practice about ten years ago.

I spent thereafter three years as a member of the Board on Professional Responsibility and a year or two on the Legal Ethics Committee of the D.C. Bar.

I have taught legal ethics at Georgetown University Law School for approximately ten years and also at the American University Law School for three or four years.

I give continuing legal education courses in legal **[189]** ethics for practicing lawyers for the American Bar Association and also for Georgetown University. I am the bar lecturer on legal ethics for an organization which instructs people on passing the bar in this jurisdiction and a number of other jurisdictions. I am the Bar Examiner for the National Board of Trial Advocacy on Legal Ethics in criminal law and civil law.

I spend about one-third of my practice defending lawyers before either disciplinary commissions here and elsewhere or in malpractice litigation.

There may be some other issues, but I'm not quite sure that I can recall them now.

Q. Have you lectured at the invitation of law firms in the District of Columbia on legal ethics? A. Yes, I have.

Q. Have you made studies and reports as an expert on legal ethics? A. I have on five occasions now served as a consultant to or been the director of reports dealing with the conduct of attorney disciplinary proceedings or the application of the Code of Professional Responsibility to those proceedings here and elsewhere.

Q. In preparation for your testimony here today, what have you reviewed? A. I have reviewed the transcripts of the proceedings **[190]** thus far—well, let me say, through March 16th. I believe there was some character witness testimony I did not review which came thereafter.

I have reviewed the letters which were sent to the court by the Davis Polk firm on December 27th and by the Butler firm on December 28th, as well as the attachment to the latter.

I have reviewed the transcript of a tape recording which I understand was prepared by the defendants of an interview with Mr. Allis' secretary that took place the night of December 27th.

I have reviewed a number of affidavits that have been proffered.

I have reviewed an Unemployment Compensation Board memorandum from the California Unemployment Compensation Board.

Q. Have you reviewed the statement itself taken on the—

A. Yes. That was an attachment to the December 28th letter. I have reviewed that.

Q. And you were present during the testimony of Mr. Allis this morning? A. Yes, sir. • • • •

[192] • • • • Q. Does the fact that the lawyer's fees were paid by the firm that selected him have any ethical consequences?

MR. COHEN: Excuse me, Your Honor. I will just make this a continuing objection. I am objecting to all of the questions and answers and moving that it all be stricken on the ground that they are assuming facts not in evidence, and also on the ground that some of the facts are improperly stated.

I would just like a continuing objection and continuing motion to strike.

THE COURT: I don't even think that issue is before me. I don't think the issue is before me in this hearing as to whether or not the conduct of Davis Polk was ethical. • • • •

[199] • • • • Q. Do you have an opinion as to whether Nicholas Allis had an ethical obligation to obtain a statement, if possible in writing, from Krystyna Janowski on December 28, 1982? A. I do.

Q. What is your opinion? A. He would not be representing Mrs. Koller competently **[200]** as required by DR 6-101, or even zealously, as required by DR 7-101, unless he in fact got a written statement from her. • • • •

[201] • • • • Q. Let me ask it again. Do you have an opinion based on ethical considerations concerning the propriety of enclosing Ms. Janowski's statement with the letter sent by the Butler firm to the Court on December 28, 1982? A. I do.

Q. And what is that? A. It was not only proper to enclose it, I think it would be improper to exclude it from the letter.

Q. Why is that? A. It was the only, as far as I know from the record, the only written statement that existed in which Ms. Janowski, as of December 28th, had stated what I believe to be the crucial and operative issue in the statement that she signed.

Q. And what is that issue? A. That she had never said to anybody that the plaintiff had not taken Bendectin during the first trimester of her pregnancy.

Q. Why do you see that as the substantive issue? **[202]** A. Well, for several reasons. First of all, Mr. Allis had a duty to ascertain whether the suit was worthless and, indeed, under DR 2-110, if he reached the conclusion that his client was committing a fraud on the court in terms of the prohibition that you cannot sue people for sport, he would be, at least at that stage, required to withdraw. It would be a mandatory withdrawal.

Second, irrespective of whether it's a mandatory withdrawal, it seems to me that when the attorney, under the broad provisions of Canon 7 that fraud not be committed on the court, learns that someone may have said something like that, the attorney has a duty to investigate, and that was the operative issue.

Indeed, had the Janowski statement been limited to that, it seems to me that would have fulfilled the ethical obligation of Mr. Allis and his partners. * * * *

[208] * * * * Q. All right. You said you had an opinion concerning the propriety of continuing the employment of Ms. Janowski **[209]** with the firm after December 27th? A. I do.

Q. What is your opinion? A. It was proper.

Q. Why do you feel it was proper? A. DR 7-109 speaks to giving money to witnesses or, for that matter, anybody else—I think a witness is the applicable word here—in order to influence testimony, or for any other purpose.

Ms. Janowski, of course, was an employee of the firm. I think it would be wholly proper to continue her as an employee of the firm, I might add, not indefinitely, but wholly proper in the period of time in which we are talking about to permit her to remain as an employee of the firm.

Let me say that that would be, I suppose, doubly so if Mr. Allis believed what she said in her statement on December 27th.

Second, I think it was not only proper but probably required to remove her from the office, at least until one had gotten to the bottom of the facts, and having her work at home, I don't know that I would have thought of it, but is a happy solution.

When you've had what is ostensibly a Canon 4 breach, a breach of confidences by an employee, it's not only prudent but I think the code would require that you find some way for **[210]** her to work so that she does not have access to the files in the case, at least temporarily.

MR. STEIN: Would Your Honor indulge me for a moment?

THE COURT: Absolutely.

Q. Of what relevance is it, looking at this as an ethical matter, of whether Mr. Allis had a reasonable basis for believing Mrs. Koller when he found himself in the quandary we are discussing? A. Well, it is relevant that he believed her. He has to pursue the interest of his client. He's mandated to do that.

Q. At what point could he give up the interest of his client?

A. I think he would need very close to—I was about to say overwhelming, but I guess that's not a helpful legal principle. I think he would almost need proof beyond a reasonable doubt that his client was lying before he could have a mandatory withdrawal, or perhaps considering, as I understand the preparation of this case, even a permissive withdrawal.

Q. Do you have an opinion as to whether Mr. Allis, from an ethical point of view, acted improperly in this case? A. I have an opinion.

Q. And what is it? A. He did not act improperly.

[213] * * * * Q. Do you have an opinion as to whether the tape-recording of it under the circumstances as testified to by Mr. Humphries and Mr. Allis, whether that was improper? A. I do.

Q. What is your opinion? A. It was not improper.

Q. Why wasn't it? A. Well, whether you have a violation of the Code of Professional Responsibility here is about 90 percent a function of state law, and I have read a memorandum with respect to what the state law is in this case, and first based on that, as long as you're not committing a crime under California law, I think that what happened here was quite proper.

Let me also say that the California statute which speaks to bribery and corruption attempts permitting tape-recording is perhaps the second 10 percent of that. In any event, it is not a violation of the Code, because the Code leaves it up to the individual states, if you will, to apply the Code based on state law.

I would say that there is an opinion of the American **[214]** Bar Association which speaks to surreptitious recording. It is discouraged. It does not have any effect on the Code, and it speaks mostly to two types of situations not relevant here. One

is telephone conversations with other attorneys, and the other is when you are in a settlement conference with an attorney and tape-recording such settlement conferences.

Q. Do you have an opinion as to whether it was improper for Mr. Allis to try to head off or at least to contain the threat to his firm's case that was posed by Ms. Janowski's becoming a witness for the other side? A. I do.

Q. And what is your opinion? A. He had an ethical obligation to get a statement from her.

Q. To head that off? A. Yes. * * * *

Cross-Examination by Mr. Cohen

[235] * * * * Q. All right. Now, let's talk about tape-recordings. You mentioned the ABA. Isn't the ABA prohibition against surreptitious tape-recordings without the knowledge of all the parties mandatory? A. Mandatory?

Q. In other words, doesn't the ABA say, "The conduct prescribed in DR 1-102(A)(4), that is to say, conduct which involves dishonesty, fraud, deceit, or misrepresentation, in the view of the committee clearly encompasses the making of recordings without the consent of all parties?"

Now, don't they say that, sir, and doesn't that seem like they are saying if you do what Allis did, that's clearly a violation falling within the conduct which involves dishonesty, deceit, and misrepresentation? A. ABA opinion 337—I think that's it, or perhaps—

Q. Yes. A. 337 has no binding effect in the District of Columbia. * * * *

Redirect Examination by Mr. Stein

[240] * * * * Q. I take it what you're saying is that if I give a witness ten dollars in order to influence their testimony, that would be an ethical violation? A. It would be if you gave them ten dollars to influence their testimony?

Q. To influence their testimony. A. That would be an ethical violation.

Q. You have already testified that given the fact that she was still their employee that it was not an ethical violation to continue her salary; is that correct? A. That is correct.

Q. Was there an ethical obligation to report the facts and circumstances to the Court on December 27th by the Butler firm? A. No.

Q. Considering ABA Opinion No. 337 and anything pertinent thereto, was the surreptitious tape-recording unethical? A. No.

[241] Q. Suppose that Ms. Janowski had told Mr. Allis that she had contacted Davis Polk and said the case was a fraud, step one. Step two, she says that when she told them that, she was not telling the truth. When she made that statement to Davis Polk, she did it for reasons of spite because she didn't like the law firm and it was untrue and she regrets it. And Mr. Allis were to take a statement which says in it that if she were to make a statement discrediting the Koller case, it would be untrue, would the taking of such a statement, based upon the circumstances I have given you, be improper? A. Again, it would not only not be improper, it would probably be required.

Q. Would the fact that the statement omitted the antecedent part, that is, she had made a statement which was untrue but regretted it, if that was omitted and the balance was included, would there be anything improper about getting the witness to sign that kind of statement? A. No.

Q. And why do you say that? A. The important thing is to get the witness's signature on the statement, and, again, the omissions or commissions become irrelevant for ethical considerations once you get the signature on the statement as to the crucial facts. * * * *

[243] * * * * Q. As part of your practice, have you given lectures and advice to investigators concerning the manner of taking statements? A. Yes.

Q. When you gave those lectures and gave that advice, did you have in mind ethical considerations surrounding the taking of statements? A. That's why I was giving the lectures.

Q Is there anything about the way Mr. Allis took this statement which offends any of the ethical considerations that you are aware of? **[244]** A. No. • • • •

Re-Cross Examination by Mr. Cohen

[245] • • • • Q. I would like to show you a copy, if I may—may I approach the witness?

THE COURT: Certainly you may.

Q. —Of Judge Johnson's order to show cause, and I would like you to read, and I will read along with you, paragraph two, which is very brief, and then I will ask you the question.

I want you to assume the following fact is true: I want you to assume that Nicholas Allis prepared and obtained a statement from Krystyna Janowski retracting her previous statement to the defendant that the instant case was fraudulent without regard for the truth of Ms. Janowski's retraction, in an apparent attempt to protect the Butler firm's financial interest in this and other related matters by thwarting any further investigation into the circumstances surrounding and the basis for Ms. Janowski's original statement.

Now, assuming all of that is true and has been found **[246]** as a fact by a fact finder, would that be a violation of ethical duty? A. A number of different things, assuming they're all true, would be a violation of ethical duties.

Q. Just spell out the different things so we have a record. A. Let me start with thwarting the investigation. If an attorney sets out to deliberately fraud the court, which is what I read thwarting the investigation to be here, that would be a violation of Canon 7, particularly DR 7-102.

If you take a statement from a witness, knowing that statement to be a lie, I think you have probably violated several different provisions of Canon 1.

If you try and influence the witness, and I am using the interest of the Butler firm in the financial statements to be a violation of DR 7—well, let me back off and put it this way.

If your financial interest becomes the most important thing in the world, you are not serving your client, and that would be a violation of Canon 6. • • • •

[252] • • • • THE COURT: I will ask you your last question, the one you want to answer about the conflicts position.

THE WITNESS: I do want to answer that.

I think D.C. law is applicable here. I don't think it's a function of where the attorney practices law. I think it is a function of where the court is located, particularly when there are Canon 7 allegations of fraud on the Court.

THE COURT: All right. And D.C. law is what?

THE WITNESS: Well, you can certainly take tape recordings in the District of Columbia.

THE COURT: Surreptitious?

THE WITNESS: Well, let me back off and say there's a federal statute about cutting, breaking, tapping or connecting to a telephone line, wire, cable or instrument, but otherwise you can—I mean, you can't do that here, and you can't do that under federal law either, and the ABA has had some things to say about it. But, yes, surreptitious **[253]** tape-recording would be all right. • • • •

THOMAS LUMBARD, called as a witness by the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Stein

Q. What is you profession, Mr. Lumbard? A. I am an attorney-at-law and right now I'm a visiting Associate Professor of Law at the California Western School of **[254]** Law in San Diego, though I practice law here in Washington.

Q. Where did you receive your college degree? A. Harvard College in 1959.

Q. Where did you receive your law degree? A. I received an LL.B. from the University of Pennsylvania in 1963.

Q. What courts are you admitted to practice in? A. In this court, in the United States District Court for the District of

Maryland, the Court of Appeals for this circuit, the courts of the State of New York and the District of Columbia.

Q. Have you published any books or articles in the field of professional responsibility? A. Yes. There are two law review articles, both published in 1981, one in the Catholic University Law Review early in the year, and one in the University of Bridgeport Law Review at the end of the year, both dealing with the field of professional responsibility and legal ethics generally, and particularly with various proposals to amend the Code of Professional Responsibility, the latter one I think particularly with the proposed confidentiality provisions of the so-called Kutak Rules.

Q. Did you write an evaluation of the proposed Code? A. Well, I wouldn't call it an evaluation. I was a consultant and associate reporter and then reporter to the **[255]** Commission on Professional Responsibility of the Roscoe Pound American Trial Lawyers Association, which produced what is called the American Lawyers' Code of Conduct, an alternative proposal to the so-called Kutak Rules, and particularly I was the reporter for the last draft of that so far that have been published and I was wholly responsible for drafting for that a proposed revision of the present Code of Professional Responsibility reflecting the substance of the completely different formated code of the Pound Foundation Commission.

Q. Have you lectured on legal responsibility? A. Yes. I have lectured to the—what is called? The Society for Christian Ethics on problems of—well, trends in the Law and Professional Responsibility in January of 1982, and I spoke twice to the annual American Bar Association Workshop on Professional Responsibility which is held every June in Chicago, once on federal agency jurisdiction to discipline attorneys and the second time at a panel discussion which was chaired by Chairman Kutak of the Kutak Commission, and the other speakers were members of that commission, the reporter of that commission, and a professor from the University of Indiana Law School. It was a symposium on the rules and I particularly addressed the confidentiality provisions, but I attacked them in general.

Q. Have you taught legal ethics? A. Yes. I've taught at—well, I gave a couple of **[256]** guest lectures at American University and at the Potomac School of Law, and then I taught—I followed Mr. Austern on the rostrum at the George Washington Unversity program for paralegals, and then I've just this summer been teaching professional responsibility at the California Western School of Law in San Diego. • • • • **[257]** • • • • Q. What matters have you reviewed in anticipation of testifying in this case? A. Well, I have reviewed the record in this proceeding. That is, the disqualification proceeding, as I understand it. And I would have to refer to my notes specifically. I started with the proposed findings of fact that were submitted by both sides, given the nature of the proceeding, giving primary consideration to the findings that were submitted by the defendant.

I examined the letter written by Mr. Ogden on December 27th; the letter written by Mr. Butler on December 28th; the statement signed by Mrs. Janowski on December 27th; the document described in her handwriting as "the conversation they want me to recall having."

I examined both transcripts of the tape recording of the interview of Mrs. Janowski by Mr. Humphries and Mr. Allis **[258]** on December 27th, and I've also examined a very small portion of the deposition of Mr. Allis and all of the transcript of the evidentiary hearing before Judge Johnson in March.

I was in the courtroom on the 31st of May and I was here for part of Mr. Allis's direct examination this morning.

Q. Based on what you have reviewed, do you have an opinion with respect to whether Nicholas Allis acted improperly in what he did when he went to Krystyna Janowski's home on December 27, 1982, including the taking of the statement and the content of the statement? A. Okay. Well, my conclusion, based on what he did, the apparent purpose of what he did, what was said, which was to get on the record what she was saying, is that what he was doing was not improper. • • • • **[261]** • • • • Q. Let's turn to the taping of the conversation. Was there in the language of the canons a reasonable expecta-

tion of confidentiality on the part of Ms. Janowski? A. Not in the instance of a conversation with two other people. I mean, this is the classic instance where if she has a privilege and she's talking in the presence of a third person, the privilege is waived. And it's the classic instance of where, no, there is not an expectation of **[262]** confidentiality. Certainly here she knows who Humphries is. She knows that Humphries is a licensed private investigator, and she knows that when she's talking to Allis in the company of Humphries that she's talking to a third person who has been brought in for the purpose of investigating.

Q. What effect does the presence of Humphries in what you have just said have on the ABA Opinion 337? A. Well, 337 is a little bit peculiar. 337 is, I think, a Watergate era aberration and it's the only ABA Opinion which does not lean very heavily on the question of the confidentiality of the communication or the expectation of the person being recorded that the conversation is private.

I think 337 is an aberration, and indeed, the New York Opinior which predates 337 goes back toward the former analysis.

I prefer the analysis in the earliest Los Angeles Opinion on this subject, which is to some extent followed by the more recent Los Angeles Opinion.

Q. And what is that? A. Well, it's essentially looking at the circumstances of the conversation and looking at whether there is an interest to be served by recording which is a proper interest and which is an interest which the lawyer needs to follow to protect the interest of the client, and it's not a question of the lawyer. That seems to follow very much in this situation.

[263] The first LA Opinion came out before the—the FCC Regulations were applicable to both intrastate and interstate telephone communications, and, therefore, there was a discussion of whether—this was basically centering on telephone recording, and because of the date, you're dealing with recording by phonographic means rather than electronic means. The opinion at that time draws a parallel between recording and

having someone else take shorthand notes of the conversation.

That committee found that occasions which arise where it would be appropriate to record telephone conversations without the knowledge of the other person for the purposes of protecting the rights of the client, the attorney's own rights and avoiding—well, securing evidence of the commission of crime, which certainly was a possibility in this instance.

One of the things that no one seems to have thought about in this case is what happens if she doesn't sign the statement; what evidence is there, other than a swearing contest, as to what happened and what she's talking about and whether she told anybody that these people are apparently attempting to suborn her in one way or another, and that scenario could not be predicted when they went to her apartment. They couldn't predict she was going to sign anything or give them anything.

Q. What are the ethical implications of what you have **[264]** just described? A. It's trying to catch a bird on the wing, and in this instance about the only way to do it would be with a recording, really not knowing which way this woman was going to jump.

Q. Would it be improper for a California lawyer to record a conversation in California without the knowledge of one of the participants if he reasonably believed that making that record was not forbidden by either state or federal law? A. Not under the California Rules of Professional Conduct, which are somewhat different, and not under the ethics opinions of the various California Bar Associations.

Q. Would such an undisclosed recording of conversation be proper under California law? A. Under the circumstances in this case, yes.

Q. Are you familiar with the misdemeanor statute dealing with a recording of conversations in California? A. I have read it. I would not say I was familiar with it.

Q. Have you taken that into consideration in giving your opinion? A. Yes, I have. It differentiates between one—there is whether the conversation is confidential, and then there is also the exception for even of a confidential communication for purposes of the detection of enumerated crimes.

[270] • • • • Q. The Butler firm was confronted with a situation of an employee who had had contact with the other side. Have you looked into the matter of the way they disengaged from such an employee and do you have an opinion as to whether the way they disengaged from her presented any ethical problems?

A. Well—

MR. COHEN: Your Honor—

THE COURT: Just one moment. There is an objection on the floor.

MR. COHEN: Excuse me, Your Honor. We are cumulative again here, Your Honor. I distinctly remember cross-examining Mr. Austern. I remember his direct examination testimony on this very issue.

Unless Mr. Lumbard has something very new and startling to say, I think it is cumulative.

THE COURT: It does appear to be cumulative to me.

MR. STEIN: I think he has an observation to make [271] which is different than what Mr. Austern made on this point, and I am getting to the end of his testimony.

THE COURT: Of course, I'm not saying that he doesn't have something different, but the fact of the matter is you present whatever expert opinion you wish, and I don't know why you should present two, but I will permit Mr. Lumbard to answer.

Don't worry about the time. I've got the time.

THE WITNESS: Well, it may have been happenstance, but in my opinion, they probably hit upon the ideal way of handling this rogue elephant.

THE COURT: What is a rogue elephant?

THE WITNESS: Rogue elephant, loose cannon, whatever language you want to use.

THE COURT: All right.

THE WITNESS: I would state that they had an obligation under the circumstances not to let her into the office. She was a quisling or seemed to be a quisling. There was enough likelihood that she might be about to betray

confidences of client, perhaps because of her mental state at the time, that to keep her out of the office where she did not have contact with any confidential materials that she could betray and yet to be able to keep her on this rather vague sort of compassionate leave that she was on at the time because of the birth of this prematurely born child seems to have been [272] an ideal situation.

They weren't sort of cutting her loose and, on the other hand, they were avoiding the major problem, which they were required by the Code to do, to prevent the betrayal of the confidences of client by this person who appeared to be likely to do that. • • • •

[273] • • • • MR. STEIN: The question would be: Was it ethical for the Davis Polk firm not to report to the Court a conversation which was had with Ms. Janowski, "How about a bribe? How about you guys bribing me?"

THE COURT: First of all, I would keep that out, and I won't even let you give me his answer because it occurs after the date and time I am concerned with. So, I would keep that out on that basis.

MR. STEIN: I understand, Your Honor, but my proffer is—

THE COURT: Your proffer I don't want, because I would keep it out because it's outside of the scope of the time frame. So don't even tell me what Mr. Lumbard would say for the record.

MR. STEIN: Is Your Honor—

THE COURT: I am ruling that you may not tell me what his response would be. Yes, that's what I'm ruling.

MR. STEIN: Okay. The next question would be: Was it ethical for Davis Polk to have continued seeing Ms. Janowski [274] after their saying she had counsel? And his answer would be that it was unethical.

MR. COHEN: Could I just comment a minute, Mr. Stein? I don't mean to interrupt.

Mr. Lumbard has testified under oath that the only material that he has reviewed has been the material of the evidentiary hearing plus some other depositions.

Now, that's been my involvement in this case, and where Mr. Stein is getting all of this information, I don't know, but it certainly hasn't been in evidence in this courtroom.

MR. STEIN: It—

THE COURT: Please let him finish.

MR. COHEN: I have heard no one testify to that, Your Honor. All I'm saying is how can an expert give an opinion based upon information that is not in the record?

Now, if Mr. Stein can produce that information in the record, then maybe—I don't think it's relevant, but clearly this man hasn't mentioned he read it.

THE COURT: That has not been testified to by anyone in the proceedings that are here under consideration, or that Mr. Lumbard said he has testified to. And, Mr. Stein, I think what I want everyone to be above all else is at least fair here. I don't think that there has been any testimony. There have been a lot of statements by counsel and there has **[275]** been a lot of unresponsiveness by a few others about what Davis Polk did, but what Davis Polk did is not at issue in this proceeding.

You are reading these rules and you are trying to put certain things into evidence. You have put that last answer and proffer in. I will permit that. If you have any other proffers, let me hear your proffer before his proffered answer. Let me rule before you give me his proffered answer, all right.

MR. STEIN: My proffer is—

THE COURT: Let me hear your proffer, and then before you give me his proffered answer, you let me rule as to whether I would even admit it.

MR. STEIN: Was it ethical for Davis Polk to pay Krystyna Janowski, as Mr. Allis testified Davis Polk paid Krystyna Janowski?

THE COURT: I would sustain the objection because there was no testimony that she was paid before the 29th of December.

MR. STEIN: My proffer would be that he would answer—

THE COURT: I am not going to permit it because I wouldn't permit the question. The question is just totally out of the time frame.

MR. STEIN: I have no further questions.

Cross-Examination by Mr. Cohen

[282] • • • • Q. Mr. Austern said it is a violation because of the use of the words "without regard for the truth of Ms. Janowski's retraction." He said that whenever people do that, that is an ethical and a disciplinary violation, and I take it you disagree? A. Well, yes, I disagree because I think Mr. Austern—well, Mr. Austern may have a different view of the purpose for which the statement was taken. I think this is like taking the defendant's statement and getting him to tell you the phony alibi story so that he can't construct another alibi story later. That's essentially what it is.

Q. But you are resisting accepting the hypothetical. The hypothetical says not only was there no regard for the truth of the retraction, but the reason why is it was an apparent attempt to protect the Butler firm's financial interest in this and other related matters by thwarting any further investigation into the circumstances surrounding and the basis for Ms. Janowski's original statement.

Now, assuming that is true, do you have, first of all, any ethical problems with it? A. Well, Mr. Cohen, after that point when you get into this description of motive, yes, I agree with the statement. Yes, that is an ethical violation.

Q. Okay. What specifically does it violate ethically? Can you give us some rules, regulations, statutes? **[283]** A. Well, it's the intention. It's the—well, I think the words are used in one instance, "to conceal that which the lawyer has a duty to reveal." If the lawyer has a duty to reveal—the way I understand your objection to Mr. Stein's last question, you're objecting to any proof of the basis for Ms. Janowski's original statement.

Q. Are you asking me a question or are your responding to my question? A. Huh?

Q. You say there are ethical violations in this. A. Yes.

Q. And it's because of the motivation? A. It's because of the motivation, yes.

Q. So that if Allis manipulated this whole thing to protect his firm's financial interest and got Janowski's retraction without respect for the truth, then in your opinion, because of that motivation, he has violated his ethical duty as an attorney? A. Well, among other things, yes, acting not in the interest of the client but in his own interest.

Q. Is that all? Has he done anything else improper? A. Well, you're talking about the thwarting of the further investigation. I have to say again that I don't see the direct proof of that in this record. Without Janowski as a witness, I don't see that proof. * * * *

Q. Now, if Mr. Allis attempted to thwart an investigation by this Court in Ms. Janowski's statements, did he do or has he done anything improper? A. 'f he was trying to thwart an investigation, yes. * * * *

Re-Direct Examination by Mr. Stein

[288] * * * * THE WITNESS * * * * It seems to me that she is still in the situation where she isn't just talking to Nick. She knows that it isn't just as though she was having a heart-to-heart. That's not Floyd Humphries' function. That's not why he talks to people, and she knows that he goes out and talks to people and submits reports on what people tell him. Certainly that conversation is likely to be reduced to the form of a written report, which might not be the case with her conversation with Allis. * * * *

Excerpts from United States District Court for the District of Columbia Order to Show Cause Hearing Transcript of July 1, 1983

[309] * * * * MR. STEIN: In connection with paragraph numbered one of the Court's Order to Show Cause dealing with the Butler issue, this is an excerpt from the voir dire examination in Oxendine versus Richardson-Merrell, which took place **[310]** on May 3, 1983, and records the Court's questions and counsel's questions concerning whether any of the prospective jurors had heard anything about any newspaper articles. * * * *

[311] * * * * MR. STEIN: On the first point, at the top of page 140, it says, "and I have said to you, we conclude when you remain silent that your individual answer to the question is in the negative."

Then reading down below, "Have you heard anything at all about this case? Have you read anything at all about this case, or have you, for that matter, read anything at all about the drug Bendectin?" And there's silence, and there's the expression, "All right. Thank you very much," and then they move on to another matter. * * * *

[314] * * * * THE COURT: Let me find out—have you finished presenting documentary evidence?

MR. STEIN: Yes, Your Honor.

THE COURT: All right. So, are you saying in effect that you have completed all that you choose to present?

MR. STEIN: Yes, Your Honor. * * * *

[344] * * * * MR. STEIN: Well, what I think I'm clear in saying, Your Honor—if I'm wrong, someone will correct me—there has been the appearance of forthcoming in this case by Davis Polk, but what has not been forthcoming is the precise amount of money that they have invested in Mrs. Janowski. If they say that they can't let her founder because of what she did, there are various ways of dealing with that. One would be good faith and the other would be questionable.

A good faith way of dealing with it would be to get an attorney who has never been in an adversary position with Butler and Allis.

Butler and Allis, as I understand the record, offered [345] to help Mrs. Janowski if Schuck were not the lawyer. They asked for another lawyer. They dispute Mr. Schuck's neutrality and they certainly have a basis for it, and as Mr. Austern said, the selection of the lawyer, the way it was done, raises questions of an ethical nature.

Why don't they come in and tell this Court precisely what money has been paid?

THE COURT: I'm sure they haven't told me because I haven't asked that and—

* * * *

THE COURT: Excuse me. And until I ask them, as far as I know, they have no obligation to do it.

Now, I know you think that they should do it, but it just happens, Mr. Stein, that I think I am the one who is controlling this litigation and not you, all right.

I am certain that if I asked them, they would tell me. They haven't failed to tell me anything to this date that I have asked them to tell me. But I have not asked them, and, as I said, as long as I control and not you, I don't see why they have to feel that they have to come in here and tell me, or to tell you, for that matter. * * * *

Excerpts From Exhibits to Supplement to Testimony of Nicholas R. Allis and James G. Butler Filed August 27, 1983*

United States District Court for the District of Columbia

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

LOS ANGELES OFFICE OF APPEALS

Phone (213) 744-2250

Case No.: LA-7567

Received—AUG 19 1983

Date Appeal Filed:
March 7, 1983

Date and Place of Hearing:
(1) May 25, 1983
(2) June 17, 1983
(3) August 4, 1983
Los Angeles, California

Parties Present:
(1) Claimant
Employer
(2) Claimant
Employer
(3) Claimant
Employer

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* This material was submitted to the District Court after the conclusion of the hearings on the Court's Order to Show Cause.

DECISION OF THE ADMINISTRATIVE LAW JUDGE

In the Matter of:

Krystyna Janowski
419 No. Bixel, #1
Los Angeles, CA 90026

Claimant-Appellant

SSA No. 360-36-8953

Butler, Jefferson, Dan & Allis
626 Wilshire Bl., Ste 914
Los Angeles, CA 90017

Employer

Account No. 105-1550-0

STATEMENT OF FACTS

* * * *

When the claimant learned that she was pregnant she requested a 6-week maternity leave and 2-week vacation that would commence January 1, 1983. However, it was necessary to modify the original planned maternity leave when the claimant underwent a Caesarean section November 27, 1982. A two-and-a-half month premature baby girl was delivered, and the infant was required to remain in the hospital intensive care unit for an extended period of time, while the claimant returned home for further recuperation. The claimant was requested to return to work during the pendency of her own recovery in order to continue with the clerical support for the Koller case litigation and she complied with this request after securing a "waiver of disability" from her physician. The claimant returned to her secretarial duties on Monday, December 13, 1982, after being off work approximately two weeks. The employer agreed to allow the claimant to utilize her remaining maternity leave at a future date when the baby would be released from the hospital. There was no interruption in the

issuance of her bi-monthly paycheck in the amount of $900.00 during her absence from work.

On December 20, 1982, the claimant met with and spoke to an employer attorney that was not primarily involved in the Koller litigation. In this conversation with the attorney, the claimant first disclosed her belief to the employer that the Koller case was fraudulent. She never made any disclosure to her supervisor, Nicholas R. Allis, who was heavily engaged in the litigation or anyone else in the office. According to the claimant, she learned during a telephone conversation on December 1, 1981, that the plaintiff, Cynthia Koller, had not taken the Bendectin during the critical first trimester of pregnancy. However, Mrs. Koller credibly denied any such conversation ever occurred. As explained by the claimant, when she made her disclosure to the attorney on December 20, 1982, he laughed and expressed disbelief of her suspicions with respect to the alleged fraud. During this conversation she requested that her hours be reduced because she believed that she would be less guilty of performing unethical acts. The attorney advised her that he would make the recommendation for the approval of the reduced work schedule, and it is undisputed that the claimant would have remained and worked on the job if she had been granted this reduced work time request. There is disputed evidence with respect to whether or not the claimant was informed that approval for the reduced time would be granted.

Following this conversation, the claimant completed additional work on the Koller case on that day, and returned to the employer's offices on the following day when she participated in the staff Christmas party. However, the claimant did not return to work after December 21, 1982, nor did she advise the company she was quitting her job at that time. Instead of reporting to work on December 22, 1982, the claimant engaged in a series of telephone calls with counsel for the defendant in the Koller case during which she discussed the case in general and responded to many questions posed to her on this litigation. The claimant decided to resign her job on December 26,

1982, and she notified a paralegal for the employer's firm. During this conversation she reported her contacts with an individual that was involved in assisting the defendant in the litigation. Upon being notified that the claimant was quitting, her supervisor-attorney, Nicholas R. Allis, and an investigator, visited the claimant at her home on December 27, 1982. During this meeting, which was tape recorded, the claimant volitionally signed a declaration to the effect that the defense in the Koller litigation was attempting to have her sign a statement reporting that Mrs. Koller stated she had not taken Bendectin, the drug in question. In her declaration under penalty of perjury, she asserted that she had refused to sign such a statement because it was not true and that she had been under a great deal of pressure to disclose case information to the defense investigator that had met with her. Shortly prior to submitting this declaration to the employer, the claimant had researched Federal perjury and confidentiality statutes. However, during the course of the unemployment insurance appeals proceedings the claimant recanted this declaration which was submitted to the employer. She explained that she provided the declaration under penalty of perjury in order to "save the Koller case." It is the claimant's contention that the principal and paramount reason for leaving her job was her belief that the Koller case was fraudulent and that she felt it was morally wrong to participate in the preparation of the litigation.

Prior to working for the most recent employer, the claimant was a legal secretary for another attorney. During that period of employment she acknowledges that she secured the social security number of an office client from her employer's file and provided it to a husband in order to assist him in securing employment, as he did not have an authorized social security number. Additionally, her employer represented a husband in a divorce action. During her employment the claimant telephoned the opposing counsel in that matter and advised him that the husband had secreted assets. Shortly following her separation from the most recent employer, the claimant was provided an expensive apartment valued at more than $650 a

month, a rental car for three months and other assistance by someone other than the most recent employer. The claimant testified that she does lie and has difficulty in "keeping her lies straight."

REASONS FOR DECISION

• • • • She acknowledges lying in the past and it must be concluded that her testimony is unworthy of belief when in dispute or contradicted by that of the employer (Evidence Code section 780, *supra*). • • • •

Furthermore, the claimant had been promised a bonus and she remained at work until after she received the equivalent of one-month's salary for having performed diligently on the Koller case. The claimant did not act as a reasonable person genuinely desirous of retaining her employment in summarily quitting her job with essentially no notice whatsoever to the employer. Rather, the claimant entered into negotiations with the opposing counsel before giving notice to the employer of her intent to quit. Having made contact with the opposing counsel, she chose to "throw her lot" in with the defense for personal and noncompelling considerations. • • • •

DECISION

The Department determination and ruling are affirmed. Benefits are denied. The employer's reserve account is relieved of benefit charges.

/s/ S. KATZ
S. Katz
Senior Administrative Law Judge

Excerpts from Deposition of Larry J. Larsen
Held on September 15, 1983

LARRY J. LARSEN, called as a witness by the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Butler

[267] • • • • Q. She said: "How about you guys bribing me? How about a bribe?" A. I believe it was something to that effect.

[268] Q. But because she had a smile on her face, you didn't believe her? A. It was a comment sort of made in jest. • • • •

[269] • • • • Q. Nobody said "No," did they? Nobody said "No"? A. I believe that "No" was said. I might have said it. Somebody else might have said it.

[270] Q. You said "No" to her jocose remark? You took it seriously enough that you had to say "No"; is that it? A. No. I think that the point was we wanted to make certain there was no misunderstanding. • • • •

Excerpts from Plaintiffs' Motion for Stay of All Proceedings
Dated January 11, 1984

United States District Court
for the District of Columbia

(Caption Omitted in Printing)

MOTION FOR STAY OF ALL PROCEEDINGS PENDING RESOLUTION OF THE APPEAL FROM THE ORDER DISQUALIFYING PLAINTIFFS' ATTORNEYS

• • • •

3. Plaintiffs will be deprived of counsel of their choice with respect to any proceedings which now take place or with

respect to any trial that proceeds, if a stay is not granted. Mrs. Koller has worked closely with the Butler law firm. She has stated in previous affidavits and again states in her affidavit attached to these papers, that she would like the Butler firm in the person of Mr. Butler and Mr. Allis to represent her interests and try the case for her and her small child who has no arms or legs. • • • •

Affidavit of Cynthia M. Koller Dated January 10, 1984
Annexed to Plaintiffs' Motion to Stay All Proceedings

United States District Court
for the District of Columbia

(Caption Omitted in Printing)

• • • •

AFFIDAVIT OF CYNTHIA M. KOLLER

Cynthia M. Koller, being duly sworn, hereby deposes and says:

1. I am the mother of Anne Elisabeth Koller.

2. As I have previously testified, the allegations of Krystyna Janowski are false. I ingested Bendectin during the critical period of my pregnancy in late September and in October 1978. I have never told or suggested the contrary to any one including Krystyna Janowski. • • • •

6. The law firm of Butler, Jefferson, Dan & Allis, and specifically Mr. Nicholas Allis and Mr. James Butler, are the attorneys I chose to represent my child, Anne Koller, in the litigation against Richardson-Merrell. While other attorneys who have appeared in the case have faithfully worked on the case, and specifically Mr. Allen Eaton and Mr. David Allen contributed to certain aspects of the litigation, the attorneys

who have been my principal attorneys and the attorneys who I have selected to try the lawsuit were Allis and Butler. I have had little or no contact with the Cohen and Kokus firm regarding this litigation except as reflected in my deposition. I believe that this court should not interfere with my choice of counsel for my child. I believe that pursuit of the lying accusations of Krystyna Janowski has taken the focus of the lawsuit away from the real issue and that is whether Bendectin and its components alter the growth and development pattern of a child and specifically whether Anne Koller is one of those children. • • • •

/s/ CYNTHIA M. KOLLER
Cynthia M. Koller

Sworn to before me this
10th day of January 1984.

/s/ VICKI HICKMAN
Notary Public

September 19, 1987
My Commission Expires

Transcript Excerpts From Testimony of Krystyna Janowski, California Unemployment Insurance Appeals Board, *In the Matter of Krystyna Janowski*, LA 7567 dated May 25, 1983, P.M. Session*

CLAIMANT KRYSTYNA JANOWSKI, having been first duly sworn, was examined and testified as follows:

Cross-Examination by Mr. Dan

• • • •

[79] *Q.* Have you testified in the past that you have invented a web of lies in regard to the Koller situation? *A.* Yes.

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* This transcript material was submitted to the District Court after the conclusion of the hearings on the Court's Order to Show Cause and after the Court's January 6, 1984 Order disqualifying the Butler firm. It was submitted to the Court in the form of exhibits in support of Plaintiffs' Reply to Defendant's Memorandum in Opposition to Plaintiffs' Motion for a Stay.

Q. Have you testified that when you're angry you say some very angry things? *A.* Yes.

Q. Did you invent lots of things in regard to the Koller case, in re you said—withdraw the question.

Did you invent an entirely fictitious individual by the name of Sanchez? *A.* Yes, I did.

Q. And did you use this fictitious individual by the name of Sanchez as being the sort of evil person in the eyes of the drug company who was importuning you to do all these dastardly deeds? *A.* Yes.

Q. And you told and lied to Mr. Daum about Mr. Sanchez, didn't you? *A.* All this was done to help the Butler firm.

Q. Did you lie to Mr. Daum about the Koller case? *A.* Yes.

[80] *Q.* Did you lie to Mr. Allis about the Koller case? *A.* Yes.

Q. Did you lie to Mr. Dan about the Koller case? *A.* Yes.

Q. Did you lie to Mr. Floyd Humphries, the firm's investigator, about the Koller case? *A.* Yes.

Q Did you lie to Mr. Richard Coleman, the lawyer hired to represent the firm about the Koller case? *A.* I hardly spoke to him, but, yes, I did.

Q. You called him up on the phone and you told him that this affidavit, Exhibit No. 3, was true, didn't you? *A.* Yes.

Q. And Mr. Richard Coleman was past president of the L. A. County Bar Association? *A.* And I was aware of that.

Q. And you called him and you told him a lie, didn't you— *A.* Yes.

Q. —or the statement is true; right? *A.* Yes.

Q. Now, you also lied to a Mr. Canales—withdraw that.

Did you tell a Mr. Canales (phonetic) that the statement, Exhibit No. 3 here, was true? *A.* William Canales, yes. I remember talking with him.

Q. And you knew he was a retired FBI investigator? *A.* Former FBI agent, something like that.

Q. You liked Mr. Daum all the time you've known him? *A.* Yes.

[81] *Q.* He was one of your great confidents in the firm? *A.* Sort of everybody's big brother.

Q. And you told him that this Exhibit 3 that you signed under penalty of perjury was true, didn't you? *A.* Yes, I think I did. I really don't recall clearly.

Q. And you told Mr. Allis, the person you characterized I believe as Robin Hood, that your statement was true, didn't you? *A.* Yes.

Q. Did you make—you've testified you make things up, don't you? *A.* Yes. Well, if I'm lying, obviously I'm making things up.

Q. You testified that you invent things, don't you? *A.* I don't recall using the word, invent. I have invented things in my life to my great regret.

Q. You have testified, quote, I get my lies confused. It's so difficult to get them straight, unquote, haven't you? *A.* That's logical, yes. I said that.

Q. You've testified, quote, isn't it a fact, Miss Janowski—pardon me. Withdraw.

Has the following question been asked you and you gave the following answer. Quote, isn't it a fact, Mrs. Janowski, that as you said yesterday, when you tell lies you can't keep them all straight, and your answer, precisely, that's the problem I'm having now, unquote? *A.* Yes, they were questioning me about previous lies and I couldn't remember what I said to whom. • • • •

[83] • • • •

Q. Have you received some compensation of any sort—withdraw that.

Have you received any sort of compensation or remuneration from anybody besides Butler, Jefferson, Dan and Allis as set forth in these payroll records since December 22, 1982, except for your disability? *A.* I can give you an example, and you tell me whether or not that's what you're referring to.

Q. Just tell me all the forms of remuneration you've—just tell me all the forms of remuneration you've received other than as set forth in these payroll records and you've obtained from disability from December 22, 1982, on. *A.* Okay. They rented for me an expensive apartment of several hundred dollars a month, six hundred—over six hundred dollars a month for 4 months, a cardiac monitor, apnea monitor from Chem-Tec Medical Supply (phonetic) out in the valley, which funds should be eventually reimbursed through the insurance policy. They rented for me an apartment at a cost to them of $615.00 a month while I kept my regular apartment on Bixel Street.

Q. When did you first move into that apartment? *A.* Oh, gee. I don't remember. I think it was **[84]** mid-February, mid-January.

Q. Are you still there? *A.* Oh, no.

Q. When did you move out of that— *A.* April 21, 1983.

Q. And are you living at someplace now that's paid for by someone other than yourself? *A.* Now I'm living back on Bixel Street.

Q. Continue, what else. *A.* They rented a car for me in January, and the rental records will show I think I turned it in the end of March. Carl Schuck will have that information from his credit cards.

Q. What else? *A.* When I was testifying in the deposition I bought—I sent my mother an airplane ticket that I paid for, and she came to babysit during the extended lengthy deposition. Afterwards Schuck asked for and obtained authorization to reimburse me that cost because they felt that it was an imposition on me to provide for childcare when the deposition was being taken at their request.

Q. Now, you understand that the monies that are being paid for in all of these respects are monies that are either coming from Richardson-Merrell or Dow Chemical or from their insurance carrier? *A.* I didn't know that at the time, but I do know that now as we sit here.

Q. And you've had lawyers appearing for you at least say over 40 hours of proceedings both in this office and their **[85]** offices? *A.* Aware of attorney's fees. I'm aware of well over 100,000.00 to the Overton, Lyman firm hired by Judge Walsh back east. I'm aware of that.

Q. Judge Walsh, Louis Walsh, is a retired judge who works for the drug company, doesn't he? *A.* Well, he's counsel of record.

Q. Lawrence Walsh? *A.* Yes.

Q. Now, what you're saying, it's your understanding more than a hundred thousand dollars has been paid on your behalf authorized by Judge Walsh for legal expenses? *A.* Fees, expenses, whatever.

Q. Have you sort of been given a carte blanche in this regard?

MRS. WHITSON: Objection, Your Honor.

MR. DAN: I'm asking for her understanding.

ALJ: Just—

CLAIMANT: I have no understanding.

ALJ: Repeat the question.

MR. DAN: I'll withdraw it. It's no problem, Your Honor.

Q. Besides the remuneration we're talking about now, and about apartments, airline tickets, car rental, medical insurance, et cetera, any other form of remuneration? *A.* Yes. Let me think. The car, the apartment—oh, **[86]** yes. In February I attempted to convert my group policy from Prudential over to a private policy and they advanced a check, a cashiers check or

a company check in the amount of approximately $1500.00 made out to the Prudential Company, which I turned over to Cindy Fisher (phonetic). That was to be a quarter premium for me and my daughter's major medical care.

Q. What is your understanding as to how long that insurance will be for your medical— *A.* That is cut off. I have applied for Medi-Cal. I have not had a decision on it yet.

Q. You were provided conversion privileges under the Prudential policy with the firm, were you not? *A.* Jim Butler made a special effort to make sure that I would take steps to keep that plan, or at least know of the opportunity.

Q. You could? *A.* Yes. He brought up the subject to my attorney so that I would not lose my insurance privileges in spite of everything that had happened.

Q. So the firm hasn't done anything in regards to your insurance that you consider inappropriate, do you? *A.* No, they have gone out of their way to make sure I have an opportunity to convert to private coverage.

Q. Any other source of compensation or remuneration that you've accepted since December 22, 1982? *A.* I don't know if the firm knows about some of these things or not.

Q. I'm asking you. **[87]** *A.* Funds come to me, I don't ask any questions. I just take the check and cash it.

Q. Go ahead. *A.* I received a check in the mail from the Prudential Insurance Company. My insurance policy works like this.

Q. Wait, wait. Is this medical insurance? *A.* No. Someone has apparently been paying my medical bills and then I am being reimbursed. I don't know who's doing it. I thought maybe Nick might be paying the baby's bills because she's named after him. Her name is A-L-L-I-S, and I thought perhaps Nick is paying them. And then of course the insurance is reimbursing all these thousands of dollars. Then it occurred to me maybe Carl Schuck is paying or Judge—retired Judge

Walsh. In any event, the money is coming to me. I'm getting these checks in the mail.

* * * *

Q. You have been receiving monies from Prudential as, [88] quote, reimbursement, quote, for your child's medical bills; is that correct? *A.* Yes.

Q. Directly from Prudential? *A.* Yes.

Q. And how much have those checks totaled, approximately? *A.* Okay. The first check I got—

Q. Just how much. *A.* Both checks, $3,000.00.

Q. And you're saying at the same time you have received monies—withdraw that.

Are you saying at the same time the hospital, the physician, whoever it was, was being paid by an unknown source? *A.* Well, I'm sure the physician—no. What I'm saying is the way my policy works, the physician is paid, an application is made to the insurance company for reimbursement. Now, I don't know who has been paying these bills. All I know is that Prudential is sending the reimbursement checks to me.

Q. Somebody is paying the doctors and the hospital and at the same time you're getting the reimbursement checks from Prudential; is that correct? *A.* That's right.

* * * *

Order of the Court of Appeals Staying All Proceedings and Setting Expedited Consideration Filed January 27, 1984

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 80-1258

No. 84-5039

ANNE ELISABETH KOLLER, et al.,
Appellants

v.

RICHARDSON-MERRELL, INC.,
Appellee

Before:

ROBINSON, *Chief Judge*; WALD* and
SCALIA, *Circuit Judges*

ORDER

On consideration of appellants' emergency motion for stay of proceedings pending appeal of order disqualifying certain trial attorneys and request for expedited consideration of appeal, and of appellee's opposition thereto, it is

ORDERED by the Court that appellants' motion is granted and further proceedings in the District Court are stayed pending further order of this Court, and it is

FURTHER ORDERED by the Court that appellants' request for expedited appeal is granted and the Clerk is directed to schedule argument during the March 1984 sitting period of the Court.

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* Circuit Judge Wald did not participate in this order.

The following briefing schedule shall apply with no extensions of time to be granted:

Appellants' brief	Served and filed —February 6, 1984
Appellee's brief	—February 22, 1984
Reply brief and joint..... appendix	—March 1, 1984

All briefs are to be personally served upon counsel

Per Curiam

Letter of James Butler to Morton Mintz
Dated January 28, 1983*

BUTLER, JEFFERSON, DAN & ALLIS
Attorneys and Counselors at Law
626 Wilshire Boulevard, Suite 914
Los Angeles, California 90017

(Letterhead Abbreviated in Printing)

January 28, 1983

Morton Mintz
The Washington Post
1150 15th St. N.W.
Washington, D.C.

Re: Bendectin

Dear Mr. Mintz:

Enclosed herewith is a copy of a letter I sent today to the Commissioner of the Food and Drug Administration, Arthur

---

* This letter is not a part of the District Court record herein. It was included for the first time by appellants in the joint appendix filed with the United States Court of Appeals for the District of Columbia Circuit.

Hull Hayes, together with a copy of the questionnaires. I am also enclosing a copy of a release for publication signed by each of the parents. I have known and admired your articles ont he [sic] drug industry and I though [sic] that these might be of particular interest to you. If you have any questions, I will be in Washington, D.C., from Sunday on at the River Inn. I also will be in court on the Koller case before Judge Norma Johnson on January 31 from 10:30 a.m. on. I appreciater [sic] your continuing interest.

Very truly yours,

BUTLER, JEFFERSON, DAN & ALLIS

/s/ JAMES G. BUTLER
James G. Butler

JGB:fl
Encls.

Order of the Supreme Court Allowing Certiorari
Dated October 15, 1984

RECEIVED—Oct 15 1984
Office of the Clerk, Supreme Court, U.S.

SUPREME COURT OF THE UNITED STATES

No. 84-127

RICHARDSON-MERRELL, INC.,

Petitioner,

v.

ANNE ELISABETH KOLLER, etc., et al.

ORDER ALLOWING CERTIORARI. Filed *October 15, 1984.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the District of Columbia Circuit* is granted.

No. 84-127

FILED
NOV 29 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARDSON-MERRELL INC.,

Petitioner,

v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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64 pp

Questions Presented

1. If a Federal District Court finds that an attorney has been guilty of misconduct in a case pending before it, may it disqualify the attorney from further participation in the case?

2. In such a case, are the District Court's findings of fact protected by the clearly erroneous rule, and is its determination subject to reversal only for abuse of discretion?

3. May an attorney be disqualified for eve of jury selection dissemination to the most widely circulated local newspaper of material previously ruled inadmissible and prejudicial (a) with intent to circumvent the orders of the District Court; (b) with intent to prejudice the defendant's case; and (c) after similar conduct in a previous case?

4. Is an order disqualifying counsel in a civil case subject to interlocutory appeal in light of *Flanagan v. United States*, 104 S. Ct. 1051 (1984)?*

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* The caption of the case in this Court contains the names of all parties to the proceedings in the court below. Petitioner (now known as Merrell Dow Pharmaceuticals Inc.) is a subsidiary of The Dow Chemical Company. The subsidiaries and affiliates of The Dow Chemical Company that have outstanding securities in the hands of the public are listed in the footnote on the first page of the Petition for a Writ of Certiorari in this case.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Opinions and Judgments Below	2
Jurisdiction	2
Statutes and Rules Involved	2
Statement of the Case	3
A. The Conduct of Butler and Allis	3
1. Butler	3
2. Allis	8
B. The Findings of the District Court	15
1. Butler: Knowing Release of Inadmissible Evidence to Prejudice Defendant's Case and Circumvent the Court's Rulings	15
2. Allis: Attempt to Thwart a True Investigation of a Crucial Witness in This Case	15
3. The Appropriateness of Disqualification	17
C. The Facts as Refound by the Court of Appeals	17
1. Butler: "Some Question" as to Bad Intent	18
2. Allis: "On the Whole," No Misconduct	19
D. The Decision of the Court of Appeals	21

PAGE

Summary of Argument 22

ARGUMENT

Point I—The Decision Below Wrongly Abolishes as a Matter of Law the Established Authority of the District Courts to Disqualify Counsel for Misconduct 25

Point II—The Court Below Brushed Aside the Clearly Erroneous Rule and the Abuse of Discretion Standard of Review 29

A. The Clearly Erroneous Rule 29

B. The Abuse of Discretion Standard 31

Point III—The Court Below Wrongly Held That an Attorney May Not Be Disqualified for Releasing Material Which Has Been Ruled Inadmissible With Intent to Circumvent the Ruling and to Prejudice an Opponent 35

Point IV—Attorney Disqualification Orders in Civil Cases Are Not Subject to Interlocutory Appeal Under *Flanagan v. United States*, 104 S. Ct. 1051 (1984) 42

CONCLUSION 49

TABLE OF AUTHORITIES

Cases PAGE

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 30

Allegaert v. Perot, 565 F.2d 246 (2d Cir. 1977) 27

Board of Education v. Nyquist, 590 F.2d 1241 (2d Cir. 1979) 21, 27

Bose Corp. v. Consumers Union, 104 S. Ct. 1949 (1984) 30-31

Brown v. Miller, 286 F. 994 (D.C. Cir. 1923) 26

City of Cleveland v. Cleveland Electric Illuminating Co., 440 F. Supp. 193 (N.D. Ohio 1976), *aff'd without opinion*, 573 F.2d 1310 (6th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978) 25

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 42, 45, 46

Commissioner v. Duberstein, 363 U.S. 278 (1960) . 30

Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 646 F.2d 1020 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981) 43

Dunton v. County of Suffolk, 729 F.2d 903 (2d Cir. 1984) 25

Evans v. Artek Systems Corp., 715 F.2d 788 (2d Cir. 1983) 27

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) 43

PAGE

Flanagan v. United States, 104 S. Ct. 1051 (1984) ..... i, 21, 24, 42-48

Freeman v. Chicago Musical Instrument Co., 689 F.2d 715 (7th Cir. 1982) 43

Geders v. United States, 425 U.S. 80 (1976) 25

General Mill Supply Co. v. SCA Services, Inc., 697 F.2d 704 (6th Cir. 1982) 32, 43

Gibbs v. Paluk, 742 F.2d 181 (5th Cir. 1984) 44, 46

Gilbert v. City of Little Rock, 622 F.2d 386 (8th Cir. 1980) 25, 32

Glueck v. Jonathan Logan, Inc., 653 F.2d 746 (2d Cir. 1981) 43

Gough v. Perkowski, 694 F.2d 1140 (9th Cir. 1982) 43

Greitzer & Locks v. Johns-Manville Corp., 710 F.2d 127 (4th Cir.), *cert. denied*, 459 U.S. 1010 (1982) 43

Groper v. Taff, 717 F.2d 1415 (D.C. Cir. 1983) 25, 33, 43

Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975) 25, 32

In re Asbestos Cases, 514 F. Supp. 914 (E.D. Va. 1981), *aff'd without opinion by an equally divided court sub nom. Greitzer & Locks v. Johns-Manville Corp.*, 710 F.2d 127 (4th Cir.), *cert. denied*, 459 U.S. 1010 (1982) 25

PAGE

In re Bendectin Products Liability Litigation, No. 84-3710 (6th Cir. Oct. 26, 1984), *petition for rehearing filed* (Nov. 9, 1984) 3

In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 658 F.2d 1355 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982) 43

In re Crary, 223 A.D. 277, 228 N.Y.S. 340 (3d Dep't 1928) 20

In re Gopman, 531 F.2d 262 (5th Cir. 1976) 32

In re Richardson-Merrell Inc. "Bendectin" Products Liability Litigation, MDL No. 486 (S.D. Ohio June 18, 1984), *vacated sub nom. In re: Bendectin Products Liability Litigation*, No. 84-3710 (6th Cir. Oct. 26, 1984), *petition for rehearing filed* (Nov. 9, 1984) 3

In re Rouss, 169 A.D. 629, 155 N.Y.S. 557 (1st Dep't 1915), *aff'd*, 221 N.Y. 81, 116 N.E. 782 (1917), *cert. denied*, 246 U.S. 661 (1918) 20-21

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) 33

Interco Systems, Inc. v. Omni Corporate Services, Inc., 733 F.2d 253 (2d Cir. 1984) 44

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982) 30

Irvin v. Dowd, 366 U.S. 717 (1961) 40

Johnson v. SmithKline Corp., Ariz. Super. Ct., Maricopa County, Cause No. C266659 8

PAGE

Kelley v. Southern Pacific Co., 419 U.S. 318 (1974) 30

Kesselhaut v. United States, 555 F.2d 791 (Ct. Cl. 1977) 25

Kevlik v. Goldstein, 724 F.2d 844 (1st Cir. 1984) 25, 32, 33

Kreda v. Rush, 550 F.2d 888 (3d Cir. 1977) 25

Krulewitch v. United States, 336 U.S. 440 (1949) .. 40

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 37, 39

Laughlin v. Eicher, 145 F.2d 700 (D.C. Cir. 1944), *cert. denied*, 325 U.S. 866 (1945) 26, 27

Link v. Wabash R.R., 370 U.S. 626 (1962) 25

Marshall v. United States, 360 U.S. 310 (1959) 41

Mekdeci v. Merrell National Laboratories, 711 F.2d 1510 (11th Cir. 1983) 17

Musicus v. Westinghouse Electric Corp., 621 F.2d 742 (5th Cir. 1980) 25

National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) 28, 33, 34

NCK Organization Ltd. v. Bregman, 542 F.2d 128 (2d Cir. 1976) 32

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) 37, 38-39, 40

Norton v. Tallahassee Memorial Hospital, 689 F.2d 938 (11th Cir. 1982), *rehearing denied*, 700 F.2d 617 (11th Cir. 1983) 32, 43

PAGE

Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc., 607 F.2d 186 (7th Cir.), *rehearing granted*, 607 F.2d 194 (7th Cir. 1979) (en banc) 32

Oneida Indian Nation v. New York, 732 F.2d 259 (2d Cir. 1984) 44

Panduit Corp. v. All States Plastic Manufacturing Co., Dkt. No. 84-569 (Fed. Cir. Sept. 25, 1984) 44-45

Patterson v. Colorado ex rel. Attorney General, 205 U.S. 454 (1907) 37, 40

Patton v. Yount, 104 S. Ct. 2885 (1984) 41

Paul E. Iacono Structural Engineer, Inc. v. Humphrey, 722 F.2d 435 (9th Cir.), *cert. denied*, 104 S. Ct. 162 (1983) 32

People v. Kennelly, 648 P.2d 1065 (Colo. 1982) 20

Pullman-Standard v. Swint, 456 U.S. 273 (1982) .. 30

Quercia v. United States, 289 U.S. 466 (1933) 25

Redd v. Shell Oil Co., 518 F.2d 311 (10th Cir. 1975) 25, 32

Richardson v. Hamilton International Corp., 469 F.2d 1382 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973) 25, 32

Richmond Hilton Associates v. City of Richmond, 690 F.2d 1086 (4th Cir. 1982) 32

Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980) 25, 28

PAGE

Rogers v. Lodge, 458 U.S. 613 (1982) 30

Ross v. Reda, 510 F.2d 1172 (6th Cir.), *cert. denied*, 423 U.S. 892 (1975) 40

Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706 (7th Cir. 1976) 25, 32

Sheppard v. Maxwell, 384 U.S. 333 (1966) 38, 40

State v. Kavanaugh, 52 N.J. 7, 243 A.2d 225, *cert. denied*, 393 U.S. 924 (1968) 35-37, 41

State v. Van Duyne, 43 N.J. 369, 204 A.2d 841 (1964), *cert. denied*, 380 U.S. 987 (1965) 40

Theard v. United States, 354 U.S. 278 (1957) 26

Trone v. Smith, 621 F.2d 994 (9th Cir. 1980) 25

United States v. Clarkson, 567 F.2d 270 (4th Cir. 1977) 32

United States v. Dinitz, 538 F.2d 1214 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977) 26

United States v. Fayer, 523 F.2d 661 (2d Cir. 1975) 20

United States v. Hobson, 672 F.2d 825 (11th Cir.), *cert. denied*, 459 U.S. 906 (1982) 26

United States v. Madsen, 148 F. Supp. 625 (D. Alaska 195) 20, 26

United States v. Snyder, 707 F.2d 139 (5th Cir. 1983) 26, 32

United States v. Yellow Cab Co., 338 U.S. 338 (1949) 30

PAGE

Viereck v. United States, 130 F.2d 945 (D.C. Cir. 1942), *rev'd*, 318 U.S. 236 (1943) 26

Woods v. Covington County Bank, 537 F.2d 804 (5th Cir. 1976) 25

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 30

Statutes and Rules

28 U.S.C. § 1291 ..... 2, 42
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1332 3
28 U.S.C. § 2101(c) 2

Fed. R. Civ. P. 52(a) 2, 22-23, 29-30

Rule 1-4, United States District Court for the District of Columbia 2

Rule 4-3(IV), United States District Court for the District of Columbia 2

Rule 4-3(VIII), United States District Court for the District of Columbia 2

District of Columbia Code of Professional Responsibility, Disciplinary Rule 1-102(A) 2

District of Columbia Code of Professional Responsibility, Disciplinary Rule 2-110(B)(1) 2

District of Columbia Code of Professional Responsibility, Disciplinary Rule 5-105(D) 2

District of Columbia Code of Professional Responsibility, Disciplinary Rule 7-102 2

PAGE

District of Columbia Code of Professional Responsibility, Disciplinary Rule 7-106 2

District of Columbia Code of Professional Responsibility, Disciplinary Rule 7-107(H) (ABA Canons of Professional Ethics, Canon 20) 2, 19, 35, 40

District of Columbia Code of Professional Responsibility, Disciplinary Rule 7-107(I) 2

District of Columbia Code of Professional Responsibility, Disciplinary Rule 7-107(J) 2

District of Columbia Code of Professional Responsibility, Disciplinary Rule 7-108(A) 2, 35

District of Columbia Code of Professional Responsibility, Disciplinary Rule 7-108(B) 2

Cal. Penal Code § 632 ..... 2, 14

Cal. Penal Code § 633.5 ..... 2, 14

Other Authorities

ABA Committee on Ethics and Professional Responsibility, Formal Opinion 337 (1974) 14

ABA Committee on Ethics and Professional Responsibility, Informal Opinion 1320 (1975) 14

ABA Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (1970) 28

Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747 (1982) 33

PAGE

Los Angeles County Bar Association Legal Ethics Committee, Formal Opinion No. 272 (1962) 14

New York State Bar Association Committee on Professional Ethics, Opinion No. 328 (1974) 14

Reply Brief for Petitioners, *Flanagan v. United States*, 104 S. Ct. 1051 (1984) 47

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-127

RICHARDSON-MERRELL INC.,

Petitioner,

v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

Petitioner Richardson-Merrell Inc., the defendant below, seeks reversal of a decision rendered by the United States Court of Appeals for the District of Columbia Circuit (Circuit Judges Wald and Mikva, with District Judge Richey concurring in a separate opinion), which reversed an order of the United States District Court for the District of Columbia (Honorable Norma Holloway Johnson, U.S.D.J.) disqualifying respondents James G. Butler and Nicholas R. Allis as two of the trial counsel for plaintiffs in this action.

Opinions and Judgments Below

The opinions delivered in the Court of Appeals are reported at 737 F.2d 1038, and are set forth in the Appendix to the Petition for a Writ of Certiorari (Pet. App. 1a-71a). The judgment of the Court of Appeals is set forth at Pet. App. 81a. The Memorandum Opinion of the District Court is not yet reported, and is set forth at Pet. App. 72a-78a. The order of the District Court appealed from is set forth at Pet. App. 79a-80a.

Jurisdiction

The judgment of the Court of Appeals was entered on May 29, 1984 (Pet. App. 81a). Petitioner's timely petition for rehearing and suggestion for rehearing en banc were denied by the Court of Appeals on July 17, 1984 (Pet. App. 82a-85a). The petition for a writ of certiorari herein was filed on July 24, 1984, and was timely under 28 U.S.C. § 2101(c). The petition for a writ of certiorari was granted by an order filed on October 15, 1984 (J. A. 342). The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. §§ 1254(1), 2101(c).

Statute and Rules Involved

28 U.S.C. § 1291; Fed. R. Civ. P. 52(a); Rules 1-4, 4-3(IV), and 4-3(VIII) of the United States District Court for the District of Columbia; Disciplinary Rules 1-102(A), 2-110(B)(1), 5-105(D), 7-102, 7-106, 7-107(H)-(J), and 7-108(A)-(B) of the District of Columbia Code of Professional Responsibility; and Sections 632 and 633.5 of the California Penal Code are set forth verbatim at Pet. App. 86a-99a.

Statement of the Case

This is a product liability case in which the plaintiffs claim that defendant's prescription drug Bendectin caused the birth defects of the infant plaintiff, Anne Elisabeth Koller.* Among the central issues in the case are whether Bendectin actually causes birth defects, and whether Mrs. Koller in fact took Bendectin during the first 40 days of pregnancy (J. A. 132).

The action was commenced on May 19, 1980 (J. A. 4). The basis for federal jurisdiction was diversity of citizenship under 28 U.S.C. § 1332 (C.A. App. 77**). Plaintiffs were represented by eight attorneys of record (C.A. App. 1, 2, 20, 21, 37, 64). On January 6, 1984, before the case proceeded to trial, the District Court found after holding evidentiary hearings that two of plaintiffs' counsel, James G. Butler and Nicholas R. Allis, were guilty of misconduct and should be disqualified from further participation in the case (Pet. App. 72a-80a).

A. The Conduct of Butler and Allis

1. Butler

The District Court entered a number of pretrial orders designed to preclude the plaintiffs from placing irrelevant and prejudicial categories of evidence before the jury:

---

* The plaintiffs in this action were included among the members of a class defined in *In re Richardson-Merrell Inc. "Bendectin" Products Liability Litigation*, MDL No. 486 (S.D. Ohio June 18, 1984). A proposed class settlement was filed with the Court. The class certification order was vacated on October 26, 1984. *In re: Bendectin Products Liability Litigation*, No. 84-3710 (6th Cir. Oct. 26, 1984), *petition for rehearing filed* (Nov. 9, 1984).

** "C.A. App." citations are to the Joint Appendix in the Court of Appeals, a copy of which has been lodged with this Court.

(1) On October 19, 1982, the District Court entered an order barring references to defendant's prior association with thalidomide, a drug unrelated to Bendectin which defendant had licensed from its German developer and had tested in the United States in 1961 until it was exposed in Germany as a cause of birth defects (J. A. 13).

(2) On January 17, 1983, the District Court precluded evidence relating to two other Butler clients, Marco Cordova and Pauline Sand, who had birth defects similar to those of the infant plaintiff, but whose cases presented collateral issues relating to the taking of Bendectin as well as to the causes of their birth defects (J. A. 59-63). The District Court stated that it was "unwilling to grant plaintiffs a license to submit the birth defects of children whose only demonstrable relationship to Anne Koller is that they have suffered birth defects that are superficially similar to those of Anne Koller" (J. A. 60-61).

(3) On January 31, 1983, the District Court directed that plaintiffs' use of Drug Experience Reports ("DERs") submitted to the Food and Drug Administration ("FDA") would be limited to no more than five DERs, chosen from among those submitted to the FDA within one year after the birth of the children involved (J. A. 84-91).*

* The DERs are reports concerning birth defects in children of mothers who took Bendectin during pregnancy. They are received and investigated by defendant and submitted by it to the FDA. They differ from the usual reports of side effects of drugs in that (1) discovery of birth defects is not simultaneous with ingestion of the drug, and (2) over 2% of all live births have serious birth defects regardless of drug ingestion. The District Court recognized that the DERs are not a random sample and are not based upon any scientific methodology (J. A. 89). In order to limit collateral issues, the District Court restricted plaintiffs to a total of no more than five DERs (*ibid.*). Because the danger of self-serving DERs increases with the time elapsed between birth and the filing of the DERs, the District Court precluded the use of DERs filed more than one year after birth (J. A. 88).

After the entry of the first two orders described above and three days before the entry of the third, Butler took steps which resulted in the circumvention of all three of these orders of the District Court. At this time, the final pretrial of the action was scheduled to begin on January 31, 1983, to be followed immediately by the trial (J. A. 67-68, 91). Butler prepared a voluminous set of simulated DERs for 14 limbless children, accompanied by 3x5 photographs of each child taken in infancy (J. A. 250; C.A. App. 2850-3107). These simulated DERs were not prepared by physicians; they were prepared by Butler and they expressed his contentions as to the facts (*see* J. A. 137, 250). All 14 children were clients of the Butler firm (J. A. 129). They included Marco Cordova and Pauline Sand, the subjects of the District Court's order of January 17, 1983 (J. A. 98-127; C.A. App. 3019-3035). All of the children were more than one year old, with ages ranging from three to 19 (*see* C.A. App. 2850-3107).

Butler sent these simulated DERs and the photographs to Morton Mintz, a reporter for *The Washington Post*, as well as to the Commissioner of the FDA, the Surgeon General, and the defendant (J. A. 133-137, 249-250, 340-341). Butler followed up this release by giving an interview to Morton Mintz on February 1, 1983, the day after the entry of the third of the District Court's preclusion orders (J. A. 249-250).

Predictably, Butler's efforts resulted in a six-column article spread across the third page of *The Washington*

Post for February 7, 1983 (J. A. 129). The article highlighted Butler's charge that the 14 limbless children were victims of Bendectin, characterizing the 14 cases as a "new chapter" in a "controversy" concerning Bendectin (*ibid.*). It described in detail the deformities of Anne Koller and several of the other children (*ibid.*). The article referred specifically to the forthcoming trial of this case, stating that the trial "may begin this week in U.S. District Court here" (*ibid.*). It reported that Butler had obtained a $2.75 million jury verdict in a thalidomide case against the defendant for a legless child, and quoted Butler as saying that most of the 14 Bendectin cases had been referred to him by lawyers who knew of his prior thalidomide case (*ibid.*). The article also recalled the thousands of serious birth defects caused by thalidomide worldwide (*ibid.*).

While the *Washington Post* article did not publish any of the photographs Butler had supplied, it referred to them as the basis for its reported details (J. A. 129). Although the article noted that Butler's views were disputed by the FDA and the Public Citizen Health Research Group as well as by the defendant, the bulk of the article, as well as its six-column headline, elaborated Butler's contentions and described the multiple lawsuits brought by Butler and others (*ibid.*).

By using *The Washington Post* in this manner, Butler was able to transmit to prospective jurors in this case all three of the irrelevant and highly prejudicial categories of evidence which the District Court had ordered to be precluded: (1) thalidomide; (2) Marco Cordova, Pauline Sand, and other "children whose only demonstrable relationship to Anne Koller is that they have suffered birth defects that are superficially similar to those of Anne

Koller" (J. A. 60-61); and (3) self-serving DERs prepared by Butler himself long after the one-year cutoff period adopted by the District Court.

This material was not released to any other newspaper or correspondent (*see* J. A. 249-250). This fact, together with the timing of the release on the eve of trial, gave rise to a powerful inference that Butler's purpose in sending the material to *The Washington Post* was to disseminate it to prospective jurors in this case, thereby circumventing the evidentiary rulings of the District Court.

On February 7, 1983, the day the *Washington Post* article appeared, defendant moved for an order precluding the Butler firm from appearing in this case (J. A. 96-97). Butler responded to the motion with an affidavit averring that his sole motive in talking to *The Washington Post* was to get Bendectin off the market (J. A. 137). At the hearing on defendant's motion on February 17, 1983, ten days after the article appeared, the District Court asked Mr. Butler's co-counsel who argued the motion, Wiley A. Branton, Jr., to explain why Butler withheld his release until just before the scheduled trial date (J. A. 138). Mr. Branton admitted that he could not answer this question (J. A. 138-139). At the end of the hearing on February 17, 1983, the District Court inquired whether plaintiffs wished to present any witnesses (J. A. 139). Mr. Branton responded, "We do not wish to present anything further" (*ibid.*).

After the hearing on February 17, 1983, as described below, the District Court entered upon an evidentiary hearing as to possible misconduct by Allis. On April 29, 1983, the District Court entered an order to show cause why the Butler firm should not be disqualified on the

basis of misconduct by both Butler and Allis (J. A. 246-248). Butler was directed to show cause why his firm should not be disqualified because of his release of the 14 DERs and other information in an effort to prejudice the jury pool awaiting selection (J. A. 247).

Butler responded to the District Court's order to show cause with an affidavit dated May 24, 1983 (J. A. 249-253). He did not testify or present any evidence at the evidentiary hearing held in response to the District Court's order to show cause (*see* J. A. 323). In his affidavit, Butler attributed the timing of his release of the 14 DERs to *The Washington Post* to the need to obtain permission for the release from the families of the 14 children (J. A. 250). However, all 14 families were clients who had been referred "[o]ver the last two years" (J. A. 129), and work on the 14 DERs began as early as October 1982 (J. A. 250).

Moreover, this was not the first case in which Butler had used the press to communicate inadmissible evidence to the jury. There was undisputed evidence that Butler had used the press to place inadmissible evidence before the jury in a previous drug product liability case in 1975, near the end of two and one half months of trial. *Johnson v. SmithKline Corp.*, Ariz. Super. Ct., Maricopa County, Cause No. C266659 (J. A. 262-267).

2. Allis

On Wednesday, December 22, 1982, Krystyna Janowski, the secretary of Butler's partner Nicholas R. Allis, telephoned the offices of one of defendant's counsel and left two telephone messages (J. A. 17-20). Among other things, Ms. Janowski stated that the case was "fraudulent", and that

> "Mrs. Koller is lying when she says she took Bendectin from bulk order at Walter Reed Army Hospital. She did not take Bendectin till much later. . . ." (J. A. 19.)

Defense counsel attempted to arrange for a conference with the District Court, but were told by the District Court's law clerk that the Court was in recess until the following Monday, December 27, 1982 (J. A. 21, 94-95). Defendant's counsel obtained independent counsel, Carl J. Schuck of the firm of Overton, Lyman & Prince in Los Angeles, to represent and advise Ms. Janowski (J. A. 21-22, 31). By a letter delivered by hand on Monday, December 27, 1982, defense counsel advised the District Court and plaintiffs' counsel of these developments (J. A. 21-22).

Meanwhile, Ms. Janowski had second thoughts about the damage that might result to the Butler firm (J. A. 56-57). On Sunday night, December 26, 1982, she contacted the Butler firm and told it that she had been induced and pressured to contact defense counsel (J. A. 57-58).* On Monday evening, December 27, 1982, after repeated discussions with Ms. Janowski and with members of the Butler firm, Allis had Ms. Janowski sign under penalty of perjury a statement which he had previously prepared (J. A. 26-27, 58-59, 181-183). Without admitting any disclosures to defense counsel, the statement attributed any conversations with the defense to emotional distress on the part of Ms. Janowski, and asserted that defense representatives had attempted to

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* In subsequent testimony under oath, Ms. Janowski and defendant's representatives who dealt with her all denied any pressure or inducement (J. A. 56, 74-75, 141-142).

induce her to sign a false statement by promises of support (J. A. 26-27). The next day, Tuesday, December 28, 1982, after receiving a copy of defense counsel's letter to the District Court, Butler wrote to the District Court, elaborating Ms. Janowski's claim of having been approached by representatives of the defendant, and submitting the statement prepared by Allis and signed by Ms. Janowski (J. A. 23-28).

On January 3, 1983, Ms. Janowski's counsel wrote to the District Court that Ms. Janowski disavowed the statement she had signed for Allis on December 27, 1982, and that the statement was obtained under duress and on an offer by the Butler firm to continue payment of Ms. Janowski's full salary and fringe benefits, including hospitalization benefits for her premature baby (J. A. 29-30). Ms. Janowski appended a signed postscript confirming these facts (J. A. 30).

Beginning on January 12, 1983, Ms. Janowski's deposition was taken in Los Angeles under the supervision of a Special Master, the Honorable Gerard D. Reilly, retired Chief Judge of the District of Columbia Court of Appeals. The Special Master ruled that the attorney-client privilege did not apply to the issue of the timing of Mrs. Koller's ingestion of Bendectin, and this ruling was affirmed by the District Court (J. A. 68-73). Ms. Janowski testified at her deposition that Mrs. Koller had admitted to her that she did not take Bendectin as early as she had testified in this case, and that she had told Allis that she had communicated this fact to defense counsel (J. A. 52-56, 59, 80). Ms. Janowski further testified that Allis told her on December 27, 1982 that she could undo the damage she had done if she would sign a statement retracting what she had said (J. A. 59). She stated that Allis agreed that she would be continued as an employee

of the Butler firm without working in the office (J. A. 79). Ms. Janowski also testified that Allis told her that if she did not cooperate, the Butler firm would destroy her with her own past (J. A. 80).*

After reading Ms. Janowski's deposition, the District Court authorized a number of depositions of representatives of both plaintiffs and defendant on the issues raised by the Janowski deposition, as well as the false issues raised by her admitted earlier fabrications regarding the alleged conduct of defense representatives (J. A. 7, 8, 66-67, 154). These depositions were followed by those of Allis and one of defendant's counsel (J. A. 131, 154).

After reviewing these depositions, the District Court ruled that an evidentiary hearing should be held, limited to the conduct of Allis in procuring the statement from Ms. Janowski and its transmission to the Court (J. A. 155-158, 160-162). The District Court severed and left for trial the issue between Ms. Janowski and Mrs. Koller (*see* J. A. 153, 154, 157, 164). The District Court stated that the issue before it was "not whether Krystyna Janowski is a credible witness or not, but whether or not whatever Krystyna Janowski knows or does not know plaintiffs have tried to keep from me" (J. A. 164).

At the evidentiary hearing held on March 10-16, 1983, Ms. Janowski was not called by either side. Plaintiffs presented no testimony, but defendant called, as hostile witnesses, Allis and other witnesses identified with the plaintiffs.

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* Ms. Janowski was in fact subjected at her deposition to brutal and prolonged cross-examination concerning aspects of her past life. This cross-examination did not succeed in shaking the testimony which Ms. Janowski gave on direct examination.

The District Court did not attempt hasty action with regard to either Butler or Allis. On April 29, 1983, it issued an order to show cause why the Butler firm should not be disqualified on the basis of misconduct by Butler and Allis (J. A. 246-248; *see* pp. 7-8 *supra*). Allis was directed to show cause why his firm should not be disqualified on the ground that Allis obtained the statement from Ms. Janowski

> "without regard for the truth of Ms. Janowski's retraction in an apparent attempt to protect the Butler firm's financial interest in this and other related matters by thwarting any further investigation into the circumstances surrounding and the basis for Ms. Janowski's original statement." (J. A. 247-248.)

At the further evidentiary hearing held on May 31, June 30, and July 1, 1983 in response to the District Court's order to show cause, Allis testified again at length, together with six character witnesses and two expert witnesses on legal ethics. At the close of the evidentiary hearing, the District Court reserved decision.

In their testimony at the evidentiary hearings, Butler and Allis claimed that they did not learn until after the statement was obtained on December 27, 1982 that Ms. Janowski had told defense counsel that the case was fraudulent (J. A. 216-217, 219-220, 223, 238-239). This testimony of Butler and Allis was contradicted, however, by their client, Mrs. Koller, their co-counsel, Allen T. Eaton, and their investigator, Floyd T. Humphries, Jr., all of whom testified that Butler or Allis had told them on December 27, 1982, before the statement was obtained, that Ms. Janowski had telephoned defense counsel and stated that the case was fraudulent (J. A. 170, 199, 200-201).

The evidence before the District Court further established that the statement prepared by Allis, as signed by Ms. Janowski and transmitted to the District Court, was seriously misleading. The statement not only did not admit Ms. Janowski's disclosures to defense counsel, but asserted that notwithstanding improper inducements by defense representatives she had refused a statement (J. A. 26). It recited that Ms. Janowski had been promised no remuneration for the statement "or for anything else" (J. A. 27), but in fact Allis agreed that Ms. Janowski could continue to receive her salary without coming into the office and proposed having a typewriter sent to her apartment (J. A. 183, 210), and also agreed that on the succeeding Friday, December 31, 1982, she would receive her vacation pay check as well as a pay check for a period during which she had not worked (J. A. 183-184, 209, 292).

The statement also twice recited that Ms. Janowski's mind was "free and clear" when she signed it (J. A. 26-27), whereas in fact Butler believed that Ms. Janowski had "flipped" or was "crazy" (J. A. 212), while Allis believed that she was "a little bit emotionally unstable" (J. A. 176), "hostile" (J. A. 232), and "an emotionally somewhat unbalanced woman" (J. A. 186). The statement and Butler's covering letter to the Court both recited Ms. Janowski's improvised cover story that defense counsel had offered her bribes and inducements (J. A. 23-24, 26), even though Butler recognized on December 26 and 27, 1982 that he had no basis for making such charges and that to act on Ms. Janowski's unsupported allegations would be reckless (J. A. 218).

The evidence before the District Court included the tape recording surreptitiously made by plaintiffs' investi-

gator, Humphries, of portions of the discussion which he and Allis had with Ms. Janowski on the evening of December 27, 1982, when the statement was signed (J. A. 269-293).* Although the tape recording includes statements by Ms. Janowski repeating her earlier story, it also shows a clear intent to end further investigation (*see, e.g.*, J. A. 277-278, 279-280, 281-282). For example, Humphries told Ms. Janowski that if she could "just state that one simple fact", then "they're going to fold up their tent and go home, you know" (J. A. 286). The tape strongly suggests that the discussion was contrived. For example, as Humphries spoke of the desirability of a statement, Ms. Janowski said "bring me or send me such a statement or pull it out of your jacket pocket by coincidence—I have no problem" (J. A. 288). This statement was followed by loud laughter, in the midst of which Humphries said: "Pull it out Nick!" (*Ibid.*) Allis then suggested that Ms. Janowski might want to cross something out, and Ms. Janowski responded, "I have to cross something out to look like I did something." (*Ibid.*) Humphries interjected, amid renewed laughter:

> "T h a a t' s right! You understand. You understand! See . . . ." (*Ibid.*)

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* The surreptitious taping of conversations by an attorney has been the subject of general ethical condemnation. *See, e.g.*, ABA Committee on Ethics and Professional Responsibility, Formal Opinion 337 (1974) and Informal Opinion 1320 (1975); Los Angeles County Bar Association Legal Ethics Committee, Formal Opinion No. 272 (1962); New York State Bar Association Committee on Professional Ethics, Opinion No. 328 (1974). Under the circumstances of this case, it would also appear that the tape recording of the discussion on the evening of December 27, 1982 violated Section 632(a) of the California Penal Code (Pet. App. 97a-99a), and was not within the limited exception provided by Section 633.5 (Pet. App. 99a).

The conversation did not return to the statement until Ms. Janowski spoke of dating it just before Humphries switched off the tape recorder (J. A. 292-293).

B. The Findings of the District Court

1. Butler: Knowing Release of Inadmissible Evidence to Prejudice Defendant's Case and Circumvent the Court's Rulings

On the basis of all the facts before it, the District Court found that "Butler's knowing release to the Post of information previously ruled inadmissible by this Court was a flagrant circumvention of the orders of this Court" (Pet. App. 77a). The District Court further found that Butler's refusal to testify as to his motives supported its "conclusion that his release of the DERs to the media was calculated to prejudice the defendant's case and circumvent the Court's prior rulings" (Pet. App. 78a). The District Court rejected plaintiffs' contention that Butler's conduct was protected by the First Amendment (Pet. App. 77a).

2. Allis: Attempt to Thwart a True Investigation of a Crucial Witness in This Case

As described above, there was a conflict in testimony between Butler and Allis, on the one hand, and Mrs. Koller, Eaton, and Humphries, on the other hand, as to whether or not Butler and Allis knew on December 27, 1982 that Ms. Janowski had telephoned defense counsel and stated that the case was fraudulent (*see* p. 12 *supra*). The District Court resolved this conflict in testimony adversely to the credibility of Butler and Allis, finding that the primary if not the sole reason for Allis's conduct on December 27, 1982 was to obtain a retraction of Ms. Janowski's statements to defense counsel:

"Allis was not merely conducting an investigation in the interest of his clients and in fulfillment of his obligations to the Court as the credible and probative evidence in the record reveals that the primary, if not the only reason, Allis and Humphries visited Janowski on December 27, 1982 was to obtain a retraction. Assuming *arguendo* that securing a statement of retraction was not the sole reason for Allis' visit, the evidence shows that procuring a retraction was clearly a controlling factor in his decision to meet with Janowski. . . ." (Pet. App. 76a.)

On the basis of all the testimony it had heard, the District Court further found that Allis's conduct in procuring the statement from Ms. Janowski and presenting it to the Court without explanation was improper (Pet. App. 76a). The District Court further found that Allis's purpose in obtaining the statement and submitting it to the Court was not "to ascertain the truth" but rather "to thwart a true investigation of a crucial witness in this case in pursuit of protecting the interests of his clients" (Pet. App. 77a). The District Court concluded that this finding as to Allis's intent was supported by a number of factors, including

"1) Allis' collaboration with Humphries to surreptitiously record a portion of his conversation with Janowski; 2) Allis' testimony under oath that he had no intention of informing the Court of the findings of his 'investigation'; 3) Allis' failure to read the prepared statement line-by-line to Janowski to ensure that she understood the contents of the statement before signing; and 4) Allis' procurement of the statement irrespective of the erratic behavior displayed by Janowski during his visit on December 27." (Pet. App. 76a-77a.)

3. The Appropriateness of Disqualification

Having found that both Butler and Allis were guilty of misconduct, the District Court proceeded to consider the appropriate remedy.

It specifically found that if the Butler firm was disqualified, "remaining counsel can provide plaintiffs with competent counsel" (Pet. App. 78a). It observed that plaintiffs' remaining counsel of record included two of the attorneys who had represented the plaintiffs in the first Bendectin case to reach trial (*ibid.*). *See Mekdeci v. Merrell National Laboratories,* 711 F.2d 1510, 1516-24 (11th Cir. 1983). For these reasons, the District Court found that "[p]laintiffs' case would not be jeopardized by the disqualification of the Butler firm" (Pet. App. 78a).

The District Court also considered the effects of disqualification upon the Butler firm (Pet. App. 75a, 78a). It concluded that these effects "do not outweigh the strong public interest in maintaining the integrity of the judicial process" (Pet. App. 78a). Accordingly, the District Court ordered the disqualification of Butler, Allis, and their firm as counsel for plaintiffs in this case (Pet. App. 79a-80a).

C. The Facts as Refound by the Court of Appeals

On appeal, the Court of Appeals (Circuit Judges Wald and Mikva, with District Judge Richey concurring "reluctantly" (Pet. App. 59a) in a separate opinion) discarded or ignored the findings of fact made by the District Court, and substituted new and different findings of its own.*

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* The majority of the Court of Appeals panel also gratuitously and unfairly criticized the District Court's inquiry as "one-sided" because it did not include certain actions of defense counsel which plaintiffs'

I. Butler: "Some Question" as to Bad Intent

With regard to Butler, the Court of Appeals stated that it had "some question" about the District Court's finding that Butler acted with intent to prejudice the defendant and to circumvent the evidentiary rulings of the District Court (Pet. App. 51a). The Court of Appeals termed "plausible" Butler's belated explanation that he had to wait until January 1983 for the parents' authorization to release the 14 DERs (*ibid.*). It ignored the admission of Butler's counsel that he could not explain the timing of the release (*see* p. 7 *supra*). It concluded that the support for the District Court's finding of bad intent was not "unambiguous" (*ibid.*). However, the Court of Appeals nowhere stated that the District Court's finding as to Butler's intent was erroneous, let alone clearly erroneous.

The Court of Appeals complained that the District Court had made no finding as to the impact of Butler's action on the likelihood of a fair trial (Pet. App. 55a). Instead of remanding to the District Court for findings on this issue, the Court of Appeals made its own finding of fact:

> "We have no basis for believing that voir dire, a process designed in part to protect against prejudicial

counsel claimed were improper (Pet. App. 49a-50a). The panel stated that it was "in no position to ascertain whether any of these activities constituted misconduct", but implied that they should have been investigated (Pet. App. 50a). The fact is that the District Court permitted discovery as to the conduct of defense counsel simultaneously with the discovery concerning the conduct of plaintiffs' counsel, but found no basis to proceed further as to defense counsel (*see, e.g.*, J. A. 154, 165-166). Plaintiffs' counsel could have brought the matter before the District Court by motion in a timely fashion, as the District Court suggested (J. A. 93, 165). Instead of submitting their allegations to the test, plaintiffs' counsel chose to leave them as mere allegations which might muddy the waters.

> publicity, would be inadequate to discover and remove any jurors influenced by the Mintz article." (*Ibid.*; footnote omitted.)

Defendant's petition for rehearing pointed out that there should be a remand for findings on this issue if the issue was deemed to be critical (pp. 7-8), but the Court of Appeals declined to remand the matter.

In its initial opinion, the Court of Appeals held that Butler did not violate Canon 20 of the District of Columbia Code of Professional Responsibility by sending inadmissible evidence to the press (Pet. App. 53a-56a). On July 16, 1984, the day before its denial of rehearing en banc (Pet. App. 84a-85a), the Court of Appeals amended its opinion to delete this holding, and replaced it with a statement that it had not determined whether or not Butler's conduct violated Canon 20 (Pet. App. 70a-71a). By way of conclusion, the Court of Appeals stated that "[w]hile Butler's decision to release the DERs to the press precisely when he did is not to be applauded," it could not furnish a basis for disqualification (Pet. App. 56a).

2. Allis: "On the Whole," No Misconduct

The District Court's central finding as to Allis was that he attempted "to thwart a true investigation of a crucial witness in this case in pursuit of protecting the interests of his clients" (Pet. App. 77a). Again, the Court of Appeals questioned this finding, but did not reverse it. The Court of Appeals acknowledged that "[t]here is authority for the proposition that surreptitious recording generally is unethical," and it stated that "this court does not sanction the practice" (Pet. App. 47a; footnote omitted). However, the Court of Appeals said that under the circumstances of this case, "Allis' actions in taping his

conversation with Janowski can more easily be understood to reflect a desire to get at the truth and to protect the interest of his client rather than to 'thwart a true investigation' " (*ibid.*).

The Court of Appeals similarly reviewed the other factors mentioned by the District Court, and indicated that it did not view them as the District Court had (Pet. App. 43a-47a). For example, the Court of Appeals dismissed the District Court's finding as to Ms. Janowski's "erratic behavior" on the evening of December 27, 1982 by saying that "we cannot find anything in Janowski's behavior that day that should have made it clear to Allis either that she did not understand what she was saying about Barnes' conduct and about the *Koller* case, or that what she was saying was untrue" (Pet. App. 44a).

The Court of Appeals stated that in the absence of any finding that Allis knew or that it was obvious that Mrs. Koller's testimony was false, it could find no impropriety in the statement obtained by Allis from Ms. Janowski (Pet. App. 42a). In making this statement, the Court of Appeals ignored the finding of the District Court that Allis's intent in obtaining the statement and presenting it to the Court without a full explanation was to thwart a true investigation of Ms. Janowski's testimony (Pet. App. 77a), an intent which rendered Allis's conduct improper regardless of whether he believed Ms. Janowski's testimony to be true or false.*

* It is well established that an attempt by a lawyer to thwart the investigation of a material witness constitutes an extremely serious violation of the basic obligations of an attorney. *See, e.g., United States v. Fayer*, 523 F.2d 661, 663 (2d Cir. 1975); *United States v. Madsen*, 148 F. Supp. 625, 628 (D. Alaska 1957); *People v. Kennelly*, 648 P.2d 1065, 1066 (Colo. 1982); *In re Crary*, 223 A.D. 277, 280, 228 N.Y.S. 340, 343-44 (3d Dep't 1928); *In re Rouss*, 169 A.D. 629, 631-32, 155 N.Y.S. 557, 559 (1st Dep't 1915), *aff'd*, 221 N.Y. 81, 116 N.E. 782 (1917), *cert. denied*, 246 U.S. 661 (1918). The court below sought to distinguish these cases on their facts (Pet. App. 42a-43a n.51), an attempt which ignored the basic principle for which the cases stand and upon which the District Court relied.

The Court of Appeals concluded that "[o]n the whole, we conclude that Allis' actions throughout the Janowski episode did not constitute misconduct and do not justify his disqualification from further representation of plaintiffs" (Pet. App. 47a-48a; footnote omitted).

D. The Decision of the Court of Appeals

The Court of Appeals initially decided that notwithstanding the holding of this Court in *Flanagan v. United States*, 104 S. Ct. 1051 (1984), a disqualification order in a civil case may be appealed without waiting for a final judgment (Pet. App. 23a-33a).

The Court of Appeals did not find any of the District Court's findings of fact to be clearly erroneous, although (as described above) it freely engaged in *de novo* factfinding on appeal. Nor did it find that the District Court had abused its discretion. Instead, the Court of Appeals held that, as a matter of law, Butler and Allis could not be disqualified on the basis of their actions in this case (Pet. App. 56a).

Citing *Board of Education v. Nyquist*, 590 F.2d 1241 (2d Cir. 1979), the Court of Appeals held that disqualification should "rarely" be granted for misconduct not involving a past or present conflict of interest (Pet. App. 37a-38a). The Court of Appeals stated that "[e]xcept in cases of truly egregious misconduct likely to infect future proceedings, other means less prejudicial to the client's

interest than disqualifying the counsel of her choice are ordinarily available to deal with ethical improprieties by counsel" (Pet. App. 38a). As examples of such other means, the Court of Appeals mentioned reprimands, contempt citations, and referrals to bar disciplinary bodies (Pet. App. 38a n.49).

Summary of Argument

1. It has long been established that the District Courts, in the exercise of their primary responsibility to supervise the conduct of attorneys appearing in cases before them, have the power to disqualify counsel for misconduct. The decision of the court below, by limiting disqualification to cases involving a past or present conflict of interest, would deprive the District Courts of this vital remedy. The suggestion of the court below that alternative means such as reprimands, contempt citations, and bar disciplinary proceedings will suffice to control premeditated misconduct by counsel ignores the serious practical difficulties standing in the way of effective professional discipline. Moreover, these alternative remedies are all retrospective and punitive in nature, in contrast to the prospective and preventive nature of the disqualification remedy. In cases such as the present case, disqualification is the only effective way to prevent the recurrence of willful misconduct by counsel.

2. The decision of the Court of Appeals ignored two basic limitations upon the scope of review of a Federal Court of Appeals: the clearly erroneous rule and the abuse of discretion standard of review.

Rule 52(a) of the Federal Rules of Civil Procedure mandates that findings of fact shall not be set aside unless

clearly erroneous. This Court has stressed again and again the importance of this rule. The Court has emphasized that the rule is of particular importance where, as here, the District Court heard oral testimony and lived with the case for a protracted period of time. The decision of the Court of Appeals violated all of these admonitions of this Court. Without holding any of the District Court's findings to be clearly erroneous, the Court of Appeals stated that it considered other findings to be more persuasive; made findings of its own rather than remanding for further findings by the District Court; and disregarded the findings of the District Court concerning the intent of Butler and Allis.

There is presently a conflict among Circuits as to whether the standard of appellate review of disqualification orders is the abuse of discretion standard or a stricter standard of review. In light of the fundamental principle that the District Courts have the primary authority and responsibility to supervise the counsel appearing before them, the correct standard of appellate review is the abuse of discretion standard. The action of the court below in substituting its own judgment for that of the District Court violated the abuse of discretion standard of review.

3. The court below questioned, but did not reverse, the finding of the District Court that Butler released inadmissible and prejudicial materials to *The Washington Post* with intent to circumvent the rulings of the District Court and to prejudice the defendant's case. The court below likewise did not reverse the finding of the District Court that Butler was guilty of misconduct.

In light of these findings, which must be taken as established for purposes of this appeal, the Court of

Appeals was wrong in holding that Butler was not subject to disqualification. This Court has repeatedly reaffirmed the power of the courts to prevent the public dissemination of inadmissible and prejudicial materials by attorneys and other officers of the court. The decision of the court below would destroy the most effective means available to the courts for preventing such deliberate misconduct.

The Court of Appeals held that Butler could not be disqualified in the absence of a finding of prejudicial impact upon prospective jurors. Even if this holding were correct, the case should have been remanded to the District Court for a finding on this issue. More fundamentally, the holding of the Court of Appeals ignores the fact that Butler intended and believed that there would be a prejudicial impact, and should not be relieved from the consequences of his acts merely because the Court of Appeals was not sure that there would be such an impact. The fundamental public interest in preserving the integrity and fairness of the judicial system requires that the courts be able to deal effectively with such misconduct.

4. In light of the holding of this Court in *Flanagan v. United States*, 104 S. Ct. 1051 (1984), orders disqualifying counsel in civil cases, like disqualification orders in criminal cases, are not appealable under the collateral order doctrine. The reasoning of this Court in *Flanagan* applies to disqualification orders in civil cases just as it does to disqualification orders in criminal cases. The decision of the court below would produce the anomalous result that of all types of orders granting or denying disqualification motions in civil and criminal cases, only orders granting such motions in civil cases would be appealable.

ARGUMENT

POINT I

The Decision Below Wrongly Abolishes as a Matter of Law the Established Authority of the District Courts to Disqualify Counsel for Misconduct.

This Court has repeatedly emphasized the vital role of the Federal District Courts in the administration of justice in the Federal courts. *See, e.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980); *Geders v. United States*, 425 U.S. 80, 86-87 (1976); *Link v. Wabash R.R.*, 370 U.S. 626, 629-33 (1962); *Quercia v. United States*, 289 U.S. 466, 469-70 (1933). Until the decision of the Court of Appeals in the present case, it was the law of each of the Circuits that the District Courts have the power to disqualify counsel in the exercise of their primary responsibility to supervise the conduct of the attorneys appearing in cases before them.* It was further

* *See, e.g., Groper v. Taff*, 717 F.2d 1415, 1418 (D.C. Cir. 1983); *Kevlik v. Goldstein*, 724 F.2d 844, 847 (1st Cir. 1984); *Dunton v. County of Suffolk*, 729 F.2d 903, 909 (2d Cir. 1984); *Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975); *Kreda v. Rush*, 550 F.2d 888, 889 (3d Cir. 1977); *Richardson v. Hamilton International Corp.*, 469 F.2d 1382, 1385 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *In re Asbestos Cases*, 514 F. Supp. 914, 919-20 (E.D. Va. 1981), *aff'd without opinion by an equally divided court sub nom. Greitzer & Locks v. Johns-Manville Corp.*, 710 F.2d 127 (4th Cir.), *cert. denied*, 459 U.S. 1010 (1982); *Musicus v. Westinghouse Electric Corp.*, 621 F.2d 742, 744 (5th Cir. 1980); *Woods v. Covington County Bank*, 537 F.2d 804, 810 (5th Cir. 1976); *City of Cleveland v. Cleveland Electric Illuminating Co.*, 440 F. Supp. 193, 195-96 (N.D. Ohio 1976), *aff'd without opinion*, 573 F.2d 1310 (6th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978); *Schloetter v. Railoc of Indiana, Inc.*, 546 F.2d 706, 710 (7th Cir. 1976); *Gilbert v. City of Little Rock*, 622 F.2d 386-87 (8th Cir. 1980); *Trone v. Smith*, 621 F.2d 994, 999 (9th Cir. 1980); *Redd v. Shell Oil Co.*, 518 F.2d 311, 314 (10th Cir. 1975); *Kesselhaut v. United States*, 555 F.2d 791, 794 (Ct. Cl. 1977).

established that this supervisory power of disqualification extends to cases involving misconduct by counsel, as well as to cases of past or present conflict of interest.*

The remedy of disqualification represents an exercise of "the elementary right of a court to protect its pending proceedings, which includes the right to dismiss from them an attorney who cannot or will not take part in them with a reasonable degree of propriety." *Laughlin v. Eicher*, 145 F.2d 700, 702 (D.C. Cir. 1944), *cert. denied*, 325 U.S. 866 (1945). Disqualification differs from disbarment, which is also an inherent power of the Federal courts, *see, e.g., Theard v. United States*, 354 U.S. 278, 281 (1957), in that disqualification terminates only the right of the disqualified counsel to appear in a particular case, while disbarment terminates counsel's right to appear in any case in the court in which counsel is disbarred. *Cf., e.g., Brown v. Miller*, 286 F. 994, 997 (D.C. Cir. 1923).

During the last two decades, with the rapid increase in the complexity of litigation and the size of law firms, there has been a substantial growth in the number of motions made to disqualify opposing counsel on the ground of an asserted past or present conflict of interest. This growth in the number of disqualification motions on conflict grounds has led to expressions of judicial concern that such motions have sometimes been made for tactical

* *See, e.g., United States v. Snyder*, 707 F.2d 139, 145 (5th Cir. 1983); *United States v. Hobson*, 672 F.2d 825, 828 (11th Cir.), *cert. denied*, 459 U.S. 906 (1982); *United States v. Dinitz*, 538 F.2d 1214, 1219-23 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); *Laughlin v. Eicher*, 145 F.2d 700, 702 (D.C. Cir. 1944), *cert. denied*, 325 U.S. 866 (1945); *Viereck v. United States*, 130 F.2d 945, 961-62 (D.C. Cir. 1942), *rev'd on other grounds*, 318 U.S. 236 (1943); *United States v. Madsen*, 148 F. Supp. 625, 627-28, 632-33 (D. Alaska 1957).

reasons.* In *Board of Education v. Nyquist*, 590 F.2d 1241, 1245-47 (2d Cir. 1979), partially in response to such concerns, the Second Circuit held that disqualification should not be granted on the basis of an alleged appearance of impropriety arising from a conflict unless there is an actual past or present conflict of interest which would "taint" the trial of the action.

Until the decision of the court below, no court had extended the decision of the Second Circuit in *Nyquist* to hold that where there has been actual misconduct by counsel in the case before the court, disqualification may not be granted in the absence of a past or present conflict of interest. Such a holding represents an entirely unwarranted extension of the holding of the Second Circuit in *Nyquist*. *Nyquist* did not purport to destroy "the right of a court to protect its pending proceedings, which includes the right to dismiss from them an attorney who cannot or will not take part in them with a reasonable degree of propriety." *Laughlin v. Eicher*, 145 F.2d 700, 702 (D.C. Cir. 1944), *cert. denied*, 325 U.S. 866 (1945). Since disqualification motions based on misconduct can only be brought where there has been serious misconduct by counsel, they do not involve the possibilities of tactical manipulation that have concerned some courts in the area of disqualification motions on conflict grounds.**

The decision of the court below, by holding that disqualification is barred in this case as a matter of law,

* *See, e.g., Evans v. Artek Systems Corp.*, 715 F.2d 788, 791-92 (2d Cir. 1983); *Board of Education v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979); *Allegaert v. Perot*, 565 F.2d 246, 251 (2d Cir. 1977).

** All of the expressions of concern over the possible tactical use of disqualification motions which were cited by the court below (Pet. App. 27a) involved disqualification motions based on alleged conflicts of interest, not misconduct of counsel.

would deprive the District Courts of a remedy which has long been recognized as a vital part of the remedies available to them to deal with misconduct by counsel.* Such a curtailing of the powers of the District Courts would be especially inappropriate in view of the growing recognition of the key role of the District Courts in preventing abusive conduct in actions pending before them. *See, e.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-43 (1976).

The court below suggested that the remedy of disqualification was not needed to deal with the problem of misconduct by counsel because alternative means such as reprimands, contempt citations, and bar disciplinary proceedings will suffice to control such misconduct. This suggestion ignores the lessons of history. In particular, it ignores the many serious practical difficulties standing in the way of effective professional discipline. *See, e.g.*, ABA Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (1970).

Equally important, the suggestion of the court below ignores the fact that the alternative remedies suggested by that court are retrospective and punitive in nature, rather than prospective and preventive. The measures suggested by the court below are all limited to dealing with past

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* Apparently unwilling to admit that it was foreclosing altogether the possibility of disqualification for misconduct, the court below indicated that disqualification might possibly be granted for misconduct, albeit "rarely" and only "in cases of truly egregious misconduct" (Pet. App. 38a). However, the Court of Appeals did not describe any set of facts on which it would sustain disqualification for misconduct, and it made clear that disqualification would not be sustained here even if misconduct were found (*see, e.g.*, Pet. App. 50a-56a).

misconduct by counsel. They do not furnish the court with any means to prevent future misconduct by counsel with a demonstrated propensity for such misconduct. In the present case, for example, Butler has demonstrated in the past a willingness to abort a jury trial by transmitting inadmissible and prejudicial material to the press (*see* p. 8 *supra*). The alternative remedies suggested by the Court of Appeals would all require the District Court to run a high risk that Butler would resort to this tactic once again if he thought he was losing. The only means of removing this risk was the remedy selected by the District Court: the disqualification of Butler from further participation in this case.

POINT II

The Court Below Brushed Aside the Clearly Erroneous Rule and the Abuse of Discretion Standard of Review.

This case calls upon this Court to reaffirm once again the basic limitations upon the scope of appellate review by a Federal Court of Appeals. The Court of Appeals in this case proceeded as though the matter were before it *de novo*. Without paying any heed to the clearly erroneous rule, the Court of Appeals freely made factual findings different from those made by the District Court. Without concerning itself with the abuse of discretion standard of review, the Court of Appeals imposed its own conception of the proper outcome in this case.

A. The Clearly Erroneous Rule

Rule 52(a) of the Federal Rules of Civil Procedure mandates that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibil-

ity of the witnesses." This Court has stressed again and again the fundamental importance of this limitation upon appellate review of findings of fact made by the District Courts. *See, e.g., Bose Corp. v. Consumers Union*, 104 S. Ct. 1949, 1959-60 (1984); *Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273, 285-90 (1982); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424-25 (1975); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960); *United States v. Yellow Cab Co.*, 338 U.S. 338, 339-41 (1949).

This Court has also emphasized that where an appellate court deems further findings of fact to be necessary, it should remand the case to the trial court for the making of such findings, rather than making such findings itself. *See, e.g., Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 & n.22 (1982), and cases cited; *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 331-32 (1974).

The clearly erroneous rule applies to findings of intent and motive, just as it does to other findings of fact. *See, e.g., Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273, 287-89 (1982); *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960); *United States v. Yellow Cab Co.*, 338 U.S. 338, 341-42 (1949). As the Court stated in *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949), "[f]indings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them."

This Court recently emphasized that the clearly erroneous rule applies with particular force in cases in which

findings of fact are based upon oral testimony and in which "trial judges have lived with the controversy for weeks or months instead of just a few hours." *Bose Corp. v. Consumers Union*, 104 S. Ct. 1949, 1959 (1984) (footnote omitted). In the present case, both of these factors giving special weight to the clearly erroneous rule are present.

The Court of Appeals in this case flouted all of the foregoing principles which this Court has repeatedly reaffirmed. Without holding any of the District Court's findings of fact to be clearly erroneous, the Court of Appeals said that it deemed other findings to be "plausible" or "more easily . . . understood" (*see* pp. 18, 19-20 *supra*). Instead of remanding for further findings to implement its newly expressed view of the law, the Court of Appeals made its own findings in areas not covered by those of the District Court (*see* pp. 18-19 *supra*). Even as to the intent of Butler and Allis, and despite the opportunity of the District Court to appraise their demeanor, the Court of Appeals disregarded the findings of the District Court (*see* pp. 18, 19-20 *supra*).

In short, the Court of Appeals knew what result it wished to reach in this case, and it rewrote the facts to match. If this were permitted, the clearly erroneous rule would be a dead letter.

B. The Abuse of Discretion Standard

Until recent years, it was generally accepted that because the District Courts have the primary responsibility for supervising the attorneys practicing before them (*see* pp. 25-26 *supra*), the standard of review on appeal of orders disqualifying attorneys should be abuse of discre-

tion.* This is still the rule in a number of Circuits.** Other Circuits, however, have begun to hold in recent years that, at least in some cases, the standard of review of attorney disqualification orders should be the clearly erroneous rule as to findings of fact, together with review for legal error as to issues of law.*** There presently exists a recognized conflict between the Circuits on this issue.****

In light of the fundamental principle that the District Courts have the primary responsibility for supervising the conduct of attorneys appearing before them, we submit that, while the subsidiary questions of fact and law involved in a District Court disqualification order should be subject to review under the standards applicable to

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* *See, e.g., Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975); *Richardson v. Hamilton International Corp.*, 469 F.2d 1382, 1386 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *United States v. Clarkson*, 567 F.2d 270, 272 n.2 (4th Cir. 1977); *In re Gopman*, 531 F.2d 262, 266 (5th Cir. 1976); *Schloetter v. Railoc of Indiana, Inc.*, 546 F.2d 706, 710 (7th Cir. 1976).

** *See, e.g., Kevlik v. Goldstein*, 724 F.2d 844, 847 (1st Cir. 1984); *NCK Organization Ltd. v. Bregman*, 542 F.2d 128, 131 (2d Cir. 1976); *Gilbert v. City of Little Rock*, 622 F.2d 386 (8th Cir. 1980); *Paul E. Iacono Structural Engineer, Inc. v. Humphrey*, 722 F.2d 435, 438 (9th Cir.), *cert. denied*, 104 S. Ct. 162 (1983); *Redd v. Shell Oil Co.*, 518 F.2d 311, 314 (10th Cir. 1975).

*** *See, e.g., Richmond Hilton Associates v. City of Richmond*, 690 F.2d 1086, 1088 (4th Cir. 1982); *United States v. Snyder*, 707 F.2d 139, 143-44 (5th Cir. 1983); *General Mill Supply Co. v. SCA Services, Inc.*, 697 F.2d 704, 711 (6th Cir. 1982); *Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.*, 607 F.2d 186, 188-89 (7th Cir.), *rehearing granted*, 607 F.2d 194 (7th Cir. 1979) (en banc); *Norton v. Tallahassee Memorial Hospital*, 700 F.2d 617, 618-20 (11th Cir. 1983).

**** *See, e.g., Kevlik v. Goldstein*, 724 F.2d 844, 847 (1st Cir. 1984); *Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.*, 607 F.2d 186, 188 (7th Cir.), *rehearing granted*, 607 F.2d 194 (7th Cir. 1979) (en banc).

questions of fact and law generally, the ultimate determination by the District Court that the remedy of disqualification is appropriate should be subject to review under the abuse of discretion standard. This was the conclusion reached by the First Circuit after a recent and careful review of the conflicting decisions of other Circuits. *See Kevlik v. Goldstein*, 724 F.2d 844, 847 (1st Cir. 1984). This Court has repeatedly reaffirmed the applicability of the abuse of discretion standard in the closely analogous area of sanctions for discovery abuse. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976). As Judge Friendly has written, the governing principle in such cases is that "[t]he district judge must be master of how to get cases to trial, and has had opportunities for frequent observation of the offending counsel which would not emerge from a cold record." Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 761 (1982).

In the present case the District of Columbia Circuit, which had previously applied a standard of abuse of discretion, *see Groper v. Taff*, 717 F.2d 1415, 1418 (D.C. Cir. 1983), aligned itself with the Circuits that have adopted a standard of review for legal error (Pet. App. 33a-34a & n.44). It then refound the facts in total violation of the clearly erroneous rule (*see* pp. 29-31 *supra*), and finally announced that on the basis of the facts it had found, it would be legal error to disqualify Butler and Allis (Pet. App. 56a).

In its relentless drive for reversal, the Court of Appeals simply ignored the District Court's careful weighing of the factors bearing upon its exercise of discretion on the

issue of disqualification (*see* p. 17 *supra*). In particular, the Court of Appeals utterly ignored the express finding of the District Court that plaintiffs' six remaining counsel of record were fully competent to represent them in the case (*see* p. 17 *supra*). In view of this uncontradicted finding, the determination of the District Court cannot be termed an abuse of discretion.

The opinion of the court below is a clear warning to the District Court that any attempt to invoke the remedy of disqualification against attorney misconduct will be met on appeal by an unbendingly hostile reception, in which the presumption will be against the action taken by the District Court, rather than in favor of it. This Court should reverse the decision of the Court of Appeals in order to make clear that the supervisory role of the District Courts cannot be so lightly brushed aside. This Court was presented with an analogous situation in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), in which the Court of Appeals had reversed the District Court's dismissal of an action for willful failure to provide discovery. The Court granted certiorari and reversed per curiam, holding that the Court of Appeals had erred by failing to apply the abuse of discretion standard of review. 427 U.S. at 642-43.

POINT III

The Court Below Wrongly Held That an Attorney May Not Be Disqualified for Releasing Material Which Has Been Ruled Inadmissible With Intent to Circumvent the Ruling and to Prejudice an Opponent.

The District Court found, on the basis of ample evidence, that Butler deliberately released irrelevant and prejudicial materials which had been ruled inadmissible by the District Court, in order to circumvent the Court's rulings and prejudice the defendant (*see* pp. 3-8, 15 *supra*). The Court of Appeals raised a "question" as to this finding, but did not (and could not) hold it to be clearly erroneous (*see* p. 18 *supra*). It must therefore be taken as established, for purposes of this appeal, that Butler acted with the intent to circumvent the District Court's preclusion orders and prejudice the defendant.

Such a deliberate attempt to prejudice prospective jurors with inadmissible evidence violates the provisions of the District of Columbia Code of Professional Responsibility, including Canon 20 and Disciplinary Rule 7-108(A) (Pet. App. 95a-96a). In its original opinion, the Court of Appeals expressed the view that there had been no violation of these provisions (*see* p. 19 *supra*). On July 16, 1984, however, the court below amended its opinion to state that it had not determined whether or not Canon 20 was violated (*see* p. 19 *supra*). Thus the finding of the District Court that Butler was guilty of misconduct stands unreversed by the Court of Appeals.

Given these findings, the present case is on all fours with *State v. Kavanaugh*, 52 N.J. 7, 243 A.2d 225, *cert. denied*, 393 U.S. 924 (1968), a case involving the well-known criminal defense counsel F. Lee Bailey. After

failing to persuade the trial court to permit the introduction into evidence of the results of polygraph tests of the defendants, Bailey sent a letter to the Governor of New Jersey, with copies to over 150 other persons, attacking the conduct of the cases and revealing the results of the polygraph tests. While Bailey (unlike Butler in this case) apparently did not himself transmit his letter to the press, the New Jersey Supreme Court understandably refused to "credit Mr. Bailey's amazement that someone turned the letter over to a reporter." 52 N.J. at 14, 243 A.2d at 229.

The New Jersey Supreme Court held that Bailey was properly disqualified on the basis of this misconduct. In words equally applicable to the present case, the New Jersey court stated:

> "It is not easy for us to oust counsel of a client's choice. But the misbehavior here is so gross that we cannot risk more of it. We have searched for some evidence that Mr. Bailey would stay in bounds, but unhappily we cannot find it. There must be a fair trial both for a defendant and for the State. The conduct here involved invaded that interest. But of even greater moment than the interest of the immediate parties is the interest of the public in the integrity of the judicial process. The antics here involved spill over upon the right of all litigants to expect justice in the courtroom and in accordance with the rules of law. We have weighed again and again whether that larger interest could be served by a subsequent disciplinary proceeding alone, and we are constrained to find that it would not. We must therefore affirm the order." 52 N.J. at 18, 243 A.2d at 231.

The court below tried to distinguish *State v. Kavanaugh* on the basis of the finding of the New Jersey court that there was no evidence that Bailey would "stay in bounds" (Pet. App. 56a). But there is likewise no evidence on the basis of which any finding could be made that Butler would "stay in bounds". Butler's position throughout has been an unrepentant insistence that he had a perfect right to do what he did (J. A. 137, 249-250). Butler has a past record of using the press to disseminate inadmissible evidence to jurors (*see* p. 8 *supra*). On the record in this case, Butler presents an even greater danger of recidivism than Bailey did in *State v. Kavanaugh*.

The issue presented by this case is of great importance to the administration of justice. Once inadmissible evidence has been leaked to the press, it is as a practical matter impossible to salvage a fair trial by restraining the dissemination of the information by the press. *See, e.g., Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838-45 (1978); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562-70 (1976). Accordingly, if the right to a fair trial is to be protected against the dissemination of inadmissible evidence, officers of the court such as Butler must be restrained from leaking such information to the press. As shown below, this Court has repeatedly held that such restraints are inherent in the role of attorneys as officers of the court.

In an often-quoted opinion by Mr. Justice Holmes in *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454, 462 (1907), the Court declared:

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), this Court expressly reaffirmed the power and the duty of the courts to prevent the public dissemination of inadmissible evidence by officers of the court. This Court stated:

> "More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. See State v. Van Duyne, 43 N.J. 369, 389, 204 A.2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements. . . ." 384 U.S. at 361.

The Court made clear that it regarded such restraints upon extrajudicial statements by officers of the court as mandatory in the interests of justice. 384 U.S. at 363.

In *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), both the majority and the concurring opinions reaffirmed the holding of *Sheppard v. Maxwell*. Mr. Chief Justice Burger stated in his opinion for the majority:

> "This Court has outlined other measures short of prior restraints on publication tending to blunt the impact of pretrial publicity. See *Sheppard* v. *Maxwell*, *supra*, at 361-362. Professional studies have filled out these suggestions, recommending that trial courts in appropriate cases limit what the contending lawyers, the police, and witnesses may say to anyone. [Citation and footnote omitted.]"* 427 U.S. at 564.

Mr. Justice Brennan's concurring opinion likewise reaffirmed the power of the courts to limit the dissemination of information by lawyers and other officers of the court:

> "As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice. It is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases, see *In re Sawyer*, 360 U. S. 622 (1959), and to impose suitable limitations whose transgression could result in disciplinary proceedings. Cf. *New York Times Co.* v. *United States*, 403 U. S., at 728-730 (STEWART, J., joined by WHITE, J., concurring). Similarly, in most cases courts would have ample power to control such actions by law enforcement personnel." 427 U.S. at 601 n.27.

See also, e.g., Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837 (1978).

The court below attached significance to the fact that there was no order of the District Court expressly prohibiting Butler from disseminating inadmissible and prejudicial materials to the press (Pet. App. 51a-52a & n.63). But such an order has never been deemed a precondition to

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* In a footnote appended at this point, the Chief Justice noted that counsel for the news media in *Nebraska Press Ass'n v. Stuart* had argued that such restraints upon officers of the court would be unconstitutional, and stated, "We are not now confronted with such issues." 427 U.S. at 564 n.8. As described below, Mr. Justice Brennan's concurring opinion found this argument to be insubstantial.

the obligation of an attorney, as an officer of the court, to refrain from disseminating inadmissible and prejudicial materials. *See, e.g., Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454, 462 (1907). In *Sheppard v. Maxwell*, 384 U.S. 333, 361 (1966), this Court cited with approval the holding of *State v. Van Duyne*, 43 N.J. 369, 389, 204 A.2d 841, 852 (1964), *cert. denied*, 380 U.S. 987 (1965), that Canon 20 of its own force prohibits the divulging of prejudicial matters by a lawyer (*see* p. 38 *supra*). *Cf., e.g., Ross v. Reda*, 510 F.2d 1172, 1173 (6th Cir.), *cert. denied*, 423 U.S. 892 (1975).

The holding of the court below as to Butler was that, even assuming that Butler had committed a deliberate violation of the Code of Professional Responsibility, he could not be disqualified in the absence of a finding that his actions had made a fair trial impossible (*see* pp. 18-19 *supra*). The Court of Appeals was clearly wrong in holding that the District Court's power to disqualify Butler should depend upon a showing that specific potential jurors have been tainted. There is no suggestion in this Court's opinions in *Sheppard v. Maxwell* and *Nebraska Press Ass'n v. Stuart* that there is any such limitation upon the power of the courts to restrain prejudicial publicity by officers of the court. The limitations upon the means available to the courts to detect a prejudicial impact upon prospective jurors are serious and well recognized. *See, e.g., Irvin v. Dowd*, 366 U.S. 717, 728 (1961); *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, *J.*, concurring).

By deliberately using the press to prejudice the jury venire, as found by the District Court (*see* pp. 3-8, 15 *supra*), Butler manifested his belief that he would succeed in tainting the jury, as well as his intention to do so.

Butler is an experienced drug product liability lawyer (*see* J. A. 252), and his belief that his actions would succeed in prejudicing the jury is the proper basis for judicial action, not the contrary speculation of the Court of Appeals (Pet. App. 55a).

Even if the Court of Appeals had been correct in demanding a finding of prejudicial impact upon the jury, the question of what finding should be made on this issue was a question for the informed determination of the District Court, not the Court of Appeals. *Cf., e.g., Patton v. Yount*, 104 S. Ct. 2885, 2891-92 (1984). By reaching out to make a *de novo* finding on this issue itself, rather than remanding to the District Court for such a finding, the Court of Appeals violated the repeated admonitions of this Court (*see* pp. 29-31 *supra*).

Moreover, the factual finding of the Court of Appeals that the materials disseminated by Butler would not irretrievably prejudice the defendant was clearly erroneous. The Court of Appeals erroneously stated that the release of material directed to potential jurors poses less danger before they have been selected to serve on the jury than after selection (Pet. App. 55a). The court cited no authority for this view, which is contrary to *State v. Kavanaugh*, 52 N.J. 7, 243 A.2d 225, *cert. denied*, 393 U.S. 924 (1968). In actuality, the danger of prejudicial impact upon jurors is greatest after they have been called for service and before they are protected by the supervision and instructions of the trial judge. *Cf., e.g., Marshall v. United States*, 360 U.S. 310, 313 (1959). What prospective jurors read at this time strikes them as a matter of first impression before they have heard the openings of counsel and the cautions of the trial court. A subsequent voir dire might have disclosed who read the

article, but it would have confronted defendant with the dilemma of accepting a tainted jury or a jury of non-readers in a case dependent upon scientific evidence.

The decision of the court below as to Butler should be reversed. If permitted to stand, the decision below would destroy the most effective means available to the courts for preventing the deliberate dissemination to prospective jurors of irrelevant and prejudicial evidence.

POINT IV

Attorney Disqualification Orders in Civil Cases Are Not Subject to Interlocutory Appeal Under *Flanagan v. United States*, 104 S. Ct. 1051 (1984).

Under 28 U.S.C. § 1291, the jurisdiction of the United States Courts of Appeals extends to appeals from "all final decisions of the district courts of the United States, . . . , except where a direct review may be had in the Supreme Court." This Court emphasized in *Flanagan v. United States*, 104 S. Ct. 1051, 1054 (1984), that the final judgment rule is "crucial to the efficient administration of justice."

In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), the Court held that the final judgment rule does not bar interlocutory review of the "small class" of orders "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Three conditions must be met before an interlocutory order can come within the *Cohen* exception:

> "First, it 'must conclusively determine the disputed question'; second, it must 'resolve an important issue completely separate from the merits of the action'; third, it must 'be effectively unreviewable on appeal from a final judgment.' *Coopers & Lybrand v. Livesay*, 437 U. S. 463, 468 (1978) (footnote omitted)."

Flanagan v. United States, 104 S. Ct. 1051, 1055 (1984).

In *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373-78 (1981), the Court held that an order denying a motion to disqualify counsel in a civil case was not appealable under the *Cohen* doctrine. The Court expressed no view as to the appealability of an order granting a motion to disqualify counsel, or of an order denying such a motion in a criminal case. 449 U.S. at 372 n.8.

During the three-year period that elapsed between the Court's decision in *Firestone Tire & Rubber Co. v. Risjord* and its recent decision in *Flanagan v. United States*, 104 S. Ct. 1051 (1984), all of the Courts of Appeals that passed upon the question held that orders disqualifying counsel in civil cases were appealable under the *Cohen* doctrine.* Similarly, with only one exception,

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* *See, e.g., Groper v. Taff*, 717 F.2d 1415, 1417 (D.C. Cir. 1983); *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746, 748 n.2 (2d Cir. 1981); *Greitzer & Locks v. Johns-Manville Corp.*, 710 F.2d 127 (4th Cir.), *cert. denied*, 459 U.S. 1010 (1982); *Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020, 1024-27 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981); *General Mill Supply Co. v. SCA Services, Inc.*, 697 F.2d 704, 706 (6th Cir. 1982); *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 717-21 (7th Cir. 1982); *Gough v. Perkowski*, 694 F.2d 1140, 1141-45 (9th Cir. 1982); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 658 F.2d 1355, 1356-58 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982); *Norton v. Tallahassee Memorial Hospital*, 689 F.2d 938, 941 (11th Cir. 1982), *rehearing denied*, 700 F.2d 617 (11th Cir. 1983).

all of the Courts of Appeals that passed upon the issue held that disqualification orders in criminal cases were likewise appealable under the *Cohen* doctrine.*

In *Flanagan v. United States*, 104 S. Ct. 1051 (1984), this Court unanimously held that orders disqualifying counsel in criminal cases are not appealable under the *Cohen* doctrine. During the period since the *Flanagan* decision was rendered, the Courts of Appeals have divided concerning the impact of the *Flanagan* decision on the appealability of disqualification orders in civil cases. In *Oneida Indian Nation v. New York*, 732 F.2d 259, 261 (2d Cir. 1984), the Second Circuit stated that *Flanagan* "certainly calls into question the continuing validity of the rule permitting interlocutory appeal of a disqualification order entered in a civil case." In *Interco Systems, Inc. v. Omni Corporate Services, Inc.*, 733 F.2d 253, 255 (2d Cir. 1984), the Second Circuit decided to continue to allow such appeals "until the issue is otherwise specifically determined by the Supreme Court." In the decision below, the District of Columbia Circuit held that disqualification orders in civil cases are appealable despite the *Flanagan* decision (Pet. App. 23a-33a). In *Gibbs v. Paluk*, 742 F.2d 181 (5th Cir. 1984) (2-1), the Fifth Circuit held that civil disqualification orders are not appealable in light of *Flanagan*.** Finally, in a decision which did not manifest any awareness of *Gibbs v. Paluk*,

* *See Flanagan v. United States*, 104 S. Ct. 1051, 1053-54 n.2 (1984), and cases cited.

** In their Supplemental Brief in Response to Petitioner's Supplemental Brief (p. 2), respondents stated that the decision of the Fifth Circuit in *Gibbs v. Paluk* was not final. This is no longer the case. The appeal in *Gibbs v. Paluk* was dismissed on October 10, 1984, and rehearing and rehearing en banc were denied on November 8, 1984. The mandate has been stayed pending the decision of this Court in the present case.

the Federal Circuit followed the holding of the court below. *Panduit Corp. v. All States Plastic Manufacturing Co.*, Dkt. No. 84-569 (Fed. Cir. Sept. 25, 1984).

The holding of this Court in the *Flanagan* case was stated in terms of disqualification orders in criminal cases. *See* 104 S. Ct. at 1053, 1057. Moreover, the opinion of the Court in *Flanagan* reaffirmed the particular importance of the final judgment rule in criminal cases. *See* 104 S. Ct. at 1054-55. On the other hand, as shown below, the reasoning of this Court in *Flanagan* applies to civil cases just as it does to criminal cases.

This Court based its analysis of the *Cohen* criteria in *Flanagan* upon two alternative assumptions: (1) that if the disqualification order was eventually held to be erroneous on an appeal from a final judgment, the judgment would automatically be reversed without any need for a showing of prejudice; and (2) that a showing of prejudice would be required.* On the first assumption, the Court held, a disqualification order "does not meet the third condition for coverage by the collateral order exception: it is not 'effectively unreviewable on appeal from a final judgment.'" 104 S. Ct. at 1056. On the second assumption, the Court held, the second *Cohen* criterion would not be satisfied, because the issue of disqualification would not be completely separate from the merits of the case:

> "On this assumption, a disqualification order, though final, is not independent of the issues to be tried. Its validity cannot be adequately reviewed until

* The Court held that for purposes of its decision on appealability, it did not need to resolve whether or not a showing of prejudice would be required. 104 S. Ct. at 1056 n.4.

> trial is complete. The effect of the disqualification on the defense, and hence whether the asserted right has been violated, cannot be fairly assessed until the substance of the prosecution's and defendant's cases is known. . . ." 104 S. Ct. at 1057.

The same reasoning also applies to disqualification orders in civil cases. If such orders are viewed as subject to reversal without any showing of prejudice—an approach which has no support in precedent and which was rejected by the court below (Pet. App. 28a-29a)—then, as in the first alternative considered by the Court in *Flanagan*, such orders would fail to meet the third *Cohen* criterion of effective unreviewability on appeal from a final judgment. On the other hand, if disqualification orders in civil cases are subject to reversal only on a showing of prejudice, then, as in the second alternative considered by the Court in *Flanagan*, the issue of prejudice cannot be divorced from a consideration of the entire record after the entry of final judgment.

Moreover, as pointed out by Judge Alvin B. Rubin in *Gibbs v. Paluk*, 742 F.2d 181, 185 (5th Cir. 1984), a holding that civil disqualification orders are appealable, when all other orders relating to disqualification are not appealable, would create an anomalous situation:

> "Whether orders denying disqualification in both civil and criminal cases are appealable has been decided. Whether orders granting disqualification in criminal cases are appealable has been decided. It would be anomalous to hold that in this domain there remains one exception: disqualification in a civil case is different. Neither language, nor logic, nor policy appears to us to warrant such an oddity. . . ."

The court below declined to apply the reasoning of *Flanagan* to civil cases, essentially on the ground that it would supposedly be impossible to show prejudice from a disqualification order at the end of the case (Pet. App. 28a-32a). The same argument was made by the losing parties in *Flanagan*,* and it has no more validity here than it did in *Flanagan*. Moreover, the reasoning of the court below does not in fact escape the logic of *Flanagan*. If a showing of prejudice is to be dispensed with, as the court below held, then, as in the first alternative considered by this Court in *Flanagan*, the third *Cohen* criterion of effective unreviewability on appeal from a final judgment is not met.

In support of its position, the court below argued that there is no counterpart in civil cases to the Sixth Amendment right to counsel in criminal cases (Pet. App. 31a-32a). If anything, however, this fact cuts against, rather than in favor of, allowing an automatic right of interlocutory appeal of disqualification orders in civil cases when there is no such right in criminal cases.**

The present appeal dramatically illustrates the unwisdom of permitting interlocutory appeals from disqualification orders in civil cases. The appeal has already delayed the further progress of the case for almost a year. It has drawn the Court of Appeals into an ill-informed

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* *See* Reply Brief for Petitioners, pp. 2-3, 8-10, *Flanagan v. United States*, 104 S. Ct. 1051 (1984).

** The Court of Appeals also suggested that counsel should have a right to appeal a disqualification, and not merely their clients (Pet. App. 32a-33a). This suggestion ignored the fact that the interest of disqualified counsel in appealing a disqualification order is no greater in civil cases than in criminal cases. Moreover, even if it were sound, this suggestion would go only to the issue of standing to take an appeal, not to the issue of the time when the appeal should be taken.

and fragmentary prejudgment of some aspects of the case. In the absence of this appeal, the trial would have gone forward with the six counsel of record for plaintiffs who were not affected by the District Court's disqualification order. By this time, the results of the trial would be known, and any appeal of the disqualification order could have proceeded against a full record encompassing the case as a whole, and not merely pieces of it.

CONCLUSION

For the reasons given in Points I-III above, the judgment of the Court of Appeals should be reversed, and the case should be remanded to the Court of Appeals with directions to affirm the order appealed from. In the alternative, for the reasons given in Point IV above, the judgment of the Court of Appeals should be reversed, and the case should be remanded to the Court of Appeals with directions to dismiss the appeal.

Dated: November 29, 1984

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No. 84-127

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARDSON-MERRELL INC.,
Petitioner,

v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF THE WASHINGTON POST AND THE AMERICAN CIVIL LIBERTIES UNION, AMICI CURIAE IN SUPPORT OF AFFIRMANCE

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. THIS CASE SHOULD BE DECIDED ON NONCONSTITUTIONAL GROUNDS	7
II. THE FIRST AMENDMENT PROHIBITS PUNISHMENT FOR OUT-OF-COURT COMMUNICATIONS IN THE ABSENCE OF EVIDENCE THAT THE COMMUNICATIONS CREATED A SERIOUS AND IMMINENT DANGER TO THE ADMINISTRATION OF JUSTICE	7
III. THE DISTRICT COURT COULD NOT HAVE PROPERLY FOUND THAT BUTLER'S COMMUNICATIONS CAUSED A SERIOUS AND IMMINENT DANGER TO THE ADMINISTRATION OF JUSTICE	12
A. Butler's Actions Did Not Violate Or Circumvent Any Court Order	12
B. Butler's Actions Did Not Violate A Disciplinary Rule Of The Code Of Professional Responsibility	14
C. Butler's Activities Did Not Create A Serious And Imminent Danger That The Jury Would Be Prejudiced	15
IV. ANY INTERPRETATION OF DISCIPLINARY RULE 7-107(H) THAT WOULD JUSTIFY DISQUALIFICATION HERE WOULD BE UNCONSTITUTIONALLY VAGUE AND OVERBROAD	18
CONCLUSION	21

TABLE OF AUTHORITIES

CASES:

	Page
Bridges v. *California*, 314 U.S. 252 (1941)	8,9,10
Broadrick v. *Oklahoma*, 413 U.S. 601 (1973)	20
Buckley v. *Valeo*, 424 U.S. 1 (1976)	18
CBS Inc. v. *District Court*, 729 F.2d 1174 (9th Cir. 1984)	17
CBS Inc. v. *Young*, 522 F.2d 234 (6th Cir. 1975)	10
Chase v. *Robson*, 435 F.2d 1059 (7th Cir. 1970) (per curiam)	10
Chicago Council of Lawyers v. *Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976)	10,11
Connally v. *General Construction Co.*, 269 U.S. 385 (1926)	18
Craig v. *Harney*, 331 U.S. 367 (1947)	8,9
Cramp v. *Board of Public Instruction*, 368 U.S. 278 (1961)	18
Garrison v. *Louisiana*, 379 U.S. 64 (1964)	7
Grayned v. *City of Rockford*, 408 U.S. 104 (1972)	18
In re Halkin, 598 F.2d 176 (D.C. Cir. 1979)	10,11
Hirschkop v. *Snead*, 594 F.2d 356 (4th Cir. 1979) (per curiam) (en banc)	11
Hynes v. *Borough of Oradell*, 425 U.S. 610 (1976)	13,18
Landmark Communications, Inc. v. *Virginia*, 435 U.S. 829 (1978)	8,9, 16,17
Irvin v. *Dowd*, 366 U.S. 717 (1961)	17
McBride v. *Merrell Dow and Pharmaceuticals Inc.*, 717 F.2d 1460 (D.C. Cir. 1983)	11
NAACP v. *Alabama ex rel. Flowers*, 377 U.S. 288 (1964)	20
NAACP v. *Button*, 371 U.S. 415 (1963)	13,18-19
In re NBC, 635 F.2d 945 (2d Cir. 1980)	8,17
Nebraska Press Association v. *Stuart*, 427 U.S. 539 (1976)	9,14, 16,17
Nixon v. *Warner Communications, Inc.*, 435 U.S. 589 (1978)	14

	Page
NLRB v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979)	7
In re Oliver, 452 F.2d 111 (7th Cir. 1971)	10
In re Oliver, 470 F.2d 15 (7th Cir. 1972)	7
Patton v. *Yount*, ___ U.S. ___, 104 S. Ct. 2885 (1984)	17
Pennekamp v. *Florida*, 328 U.S. 331 (1946)	8,9,16
Seattle Times Co. v. *Rhinehart*, ___ U.S. ___, 104 S. Ct. 2199 (1984)	8,13
Sheppard v. *Maxwell*, 384 U.S. 333 (1966)	17
Smith v. *California*, 361 U.S. 147 (1959)	18
Smith v. *Goguen*, 415 U.S. 566 (1974)	18
Stromberg v. *California*, 283 U.S. 359 (1931)	18
Thornhill v. *Alabama*, 310 U.S. 88 (1940)	7,20
United States v. *Cardiff*, 344 U.S. 174 (1952)	18
United States v. *Haldeman*, 559 F.2d 31 (D.C. Cir. 1976) (per curiam) (en banc), *cert. denied*, 431 U.S. 933 (1977)	8,17
Waller v. *Georgia*, ___ U.S. ___, 104 S. Ct. 2210 (1984)	14
Wood v. *Georgia*, 370 U.S. 375 (1962)	8,10

RULES:

District of Columbia Code of Professional Conduct, Disciplinary Rule 7-106(C)	15
District of Columbia Code of Professional Conduct, Disciplinary Rule 7-107(H)	15,18, 19,20
District of Columbia Code of Professional Conduct, Disciplinary Rule 7-108(A)	15
District of Columbia Code of Professional Conduct, Disciplinary Rule 7-108(B)(1)	15

UNITED STATES CONSTITUTION:

First Amendment	*passim*
Sixth Amendment	14

MISCELLANEOUS:

ABA Canons of Professional Ethics, Canon 20	19
Legal Ethics Committee of the District of Columbia Bar, Formal Op. 8 (1975)	20

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ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,
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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF OF THE WASHINGTON POST AND THE AMERICAN CIVIL LIBERTIES UNION, AMICI CURIAE

The Washington Post ("The Post") and The American Civil Liberties Union ("ACLU") submit this brief as *amici curiae* in support of respondents' claim that the District Court should not have disqualified James G. Butler for his communications with the press. Pursuant to Rule 36.2 of the Rules of this Court, all parties to this action have given their written consent to the filing of this brief. Copies of the letters of consent have been filed with the clerk.

INTEREST OF THE AMICI

The Post publishes a newspaper of general circulation in the metropolitan Washington D.C. area that reports on matters

of local, regional and national interest. In its frequent coverage of legal proceedings and related agency actions, it relies heavily on attorneys, who are often the most informed individuals, for information about the underlying issues and the status of the proceedings, particularly at the pretrial stage. Consequently, The Post has an interest in the development of legal principles that determine whether a lawyer can be punished for communicating with the press when no court order prohibits communication and when a similar communication to a non-press individual was not punished.

The ACLU, a national, nonpartisan organization of over 200,000 members, was founded over 60 years ago to preserve and protect the fundamental principles of the Bill of Rights. It has frequently appeared in this Court, both as representative of parties and as *amicus curiae*. The ACLU's interest in this case stems from the longstanding concern of the organization and its members for protecting to the fullest extent the rights secured by the First Amendment to the Constitution. The extent of one of those rights—an attorney's right to discuss matters of public interest outside the courtroom—is at issue in this case.

STATEMENT OF THE CASE

In May, 1980 James G. Butler and his co-counsel filed a lawsuit on behalf of plaintiffs Cynthia and John Koller and their daughter Anne Elisabeth Koller against Richardson-Merrell Inc. ("Richardson-Merrell"). The complaint alleged that Mrs. Koller's use of Bendectin, a drug made by Richardson-Merrell, during the first trimester of her pregnancy caused her daughter's severe birth defects. Pet. App. 2a. Trial was expected to occur in February or March, 1983. J.A. 247.

In a letter dated January 28, 1983, Butler wrote to Arthur H. Hayes, then Commissioner of the Food and Drug Administration ("FDA"), concerning birth defects that have occurred after the mothers took Bendectin during pregnancy. He wrote,

> "[i]t appears to me that solely on a humanitarian basis, the time has now come for the Food and Drug Administration to do something to warn the public of the dangers of Bendectin." J.A. 124.

He enclosed 14 drug experience reports ("DERs") he had compiled, each indicating the birth defects of a child and the use of Bendectin by the mother. J.A. 134. On the same day, Butler wrote Morton Mintz, a staff writer at The Post, enclosing a copy of his letter to Commissioner Hayes and the 14 DERs. Butler has stated that his only motive in communicating with the press was to remove the drug from the market. J.A. 137.

Richardson-Merrell had previously filed a motion to exclude DERs from evidence. On January 31, 1983 an Order and an Opinion on the admissibility of DERs were filed and handed to the parties in open court. J.A. 84, 91. The court denied Richardson-Merrell's motion to exclude all DERs, allowing plaintiffs to introduce five samples from those DERs that were initiated less than one year after birth. J.A. 91. Previously, on January 17, the court had ruled that evidence of the birth defects of two of the individuals, Marco Cordova and Pauline Sands, was inadmissible. J.A. 63. Cordova and Sands were two of the individuals described in the 14 DERs.

Morton Mintz interviewed Butler on February 1, 1983, J.A. 249-50, and on February 7, The Post published an article about seven lawsuits that had been filed alleging that Bendectin caused birth defects. J.A. 129. It referred to the 14 DERs, seven of which related to the suits that had been filed. The article quoted the FDA as saying that as of the previous week it had no evidence that Bendectin caused the defects, and stated that the Public Citizen Health Research Group, "FDA's most relentless critic," also found no causal connection. It quoted Richardson-Merrell's spokesman at length, then went on to describe both sides of the dispute. Three paragraphs out of the total of 23 referred to the instant case, and those were in the fourth column of the six-column story. J.A. 129.

On the day the article was published, Richardson-Merrell moved to impose sanctions on Butler for having communicated with the press. Richardson-Merrell alleged that the release of the information to the press will "inevitably create unfair prejudice among some of the jury panel." J.A. 95-96. When Butler wrote Mintz, the jury panel for February, but not March, had been selected. Richardson-Merrell's motion had the effect of postponing jury selection and the trial.

On January 6, 1984, the court issued an Order and Opinion disqualifying Butler from further representation by revoking his *pro hac vice* admission solely because of his contact with The Post. Pet. App. 72a, 81a. The court did not base its actions on Butler's contact with the Commissioner of the FDA. The court stated that revocation of a *pro hac vice* appearance is within the discretion of the court; that conduct that does not violate a Disciplinary Rule of the Code of Professional Responsibility may be sufficient to justify disqualification; and that the standard for revocation of a *pro hac vice* appearance is "whether the conduct of the attorney is so impermissible as to warrant the revocation of his admission *pro hac vice.*" Pet. App. 75a. Applying this standard, the court concluded:

> "Butler's knowing release to the Post of information previously ruled inadmissible by this court was a flagrant circumvention of the Orders of this Court as Mintz's article appeared in the Post in February 1983 after the jury panel had been drawn for that month and after the Court and the parties were preparing for trial." Pet. App. 77a-78a.

The court did not find that Butler had violated any disciplinary rules or that he had violated any court order. Nor did the court find that an impartial jury could not be selected from the jury pool through the use of voir dire.

The Court of Appeals for the District of Columbia reversed the decision of the District Court and remanded for the reinstatement of the appearance of Butler on behalf of the plaintiffs. 737 F.2d 1038 (D.C. Cir. 1984) (Pet. App. 1a-71a). The Court of Appeals concluded that attorneys admitted to practice *pro hac vice* are not more vulnerable to disqualification than attorneys who are licensed to practice before the court, Pet. App. 35a; that disqualification is appropriate only in cases of "truly egregious misconduct likely to infect future proceedings," Pet. App. 38a; and that the record could not support a finding that Butler's conveyance of information to the press was likely to infect future proceedings, Pet. App. 55a. In concluding that future proceedings would not be infected, the court stated that the article that appeared in *The Washington Post* " was far

from inflammatory, and gave substantial space to those, including defendant, who disputed Butler's assessment of the teratogenic qualities of Bendectin." Pet. App. 54a. The article was printed before jurors were assigned to the case, and the court had "no basis for believing that voir dire, a process designed in part to protect against prejudicial publicity, would be inadequate to discover and remove any jurors influenced by the Mintz article." Pet. App. 55a (footnote omitted).

SUMMARY OF ARGUMENT

The record of this case provides ample grounds for this Court to affirm, without reaching any constitutional issues, the reversal of the order disqualifying Butler for his contact with the press. If the case is not resolved in Butler's favor on nonconstitutional grounds, however, the First Amendment, on the facts of this case, precludes Butler's disqualification for having communicated with the press about matters relating to a pending case in which he participated.

The trial court erred when it failed to recognize Butler's First Amendment rights and to apply the constitutional presumption that a court cannot punish an individual for communicating with the press. The court punished Butler for conveying information similar to information subject to the court's evidentiary rulings after judging his conduct by a purely discretionary standard and finding that Butler's actions circumvented an evidentiary ruling. In doing so, it impliedly interpreted the evidentiary rulings as protective orders and singled out for punishment Butler's contact with the press. This Court, however, has consistently held that speech cannot be deterred by punishment in order to protect the judicial process except in extremely limited circumstances which are defined by a high constitutional and nondiscretionary standard. Because the threat of punishment will deter speech during the pendency of a proceeding when it can be of great interest and value to the public, an individual cannot be punished for exercising his First Amendment rights by communicating with the press if the communications do not create a serious and imminent harm to the fair and orderly administration of justice.

When the proper standard is applied, it becomes obvious that the record is incapable of supporting the trial court's finding. Butler's actions did not create any serious or imminent harm to the administration of justice. First, he did not violate or circumvent any court order. Evidentiary rulings do not contain any prohibition on disclosure of information to anyone but the jurors during the trial, and the court had not entered a protective order or any restraint on the attorneys' freedom to speak. Second, Butler did not violate a Disciplinary Rule of the District of Columbia Code of Professional Responsibility. Last, and perhaps most importantly, Butler's actions did not interfere with Richardson-Merrell's ability to obtain an impartial jury.

The First Amendment's protection of speech relating to pending proceedings recognizes the importance of uninhibited public discussion about matters before the courts. Participating attorneys, who will be knowledgeable about the proceedings and the underlying issues, can provide valuable information and enhance that discussion; and the press, which regularly covers legal proceedings, can convey the information to the public. Although a judge might prefer to have potential jurors read in the press only those facts that are actually admissible at trial, the rules of evidence do not define the scope of an attorney's right to discuss pending litigation and the underlying legal and social issues. Conveying information similar to that excluded from admission at trial but not under any protective order creates no serious threat to the administration of justice but rather is consistent with the tradition of the openness of judicial proceedings and the public interest in knowing not only what is admitted into evidence at trial but what is not.

If the District Court's order were reinstated, attorneys would speak to the press at the peril that a judge would later find their conduct "so impermissible" as to require disqualification. The severity of the punishment and the vagueness of the standard used to invoke it would inhibit their willingness to speak, effectively label reporters of court proceedings as lepers, and cut short the public's information about proceedings as they unfold.

ARGUMENT

I. THIS CASE SHOULD BE DECIDED ON NONCONSTITUTIONAL GROUNDS.

As Butler argues at length in his brief, this Court has ample cause to affirm the reversal of the District Court's disqualification order on grounds that raise no constitutional issues. For example, this Court could agree with the conclusion of the Court of Appeals that the facts of this case could not justify a disqualification order, and therefore find it unnecessary to reach the constitutional issues that would arise if disqualification were otherwise within the discretion of the trial court. *See In re Oliver*, 470 F.2d 15, 17 n.7 (7th Cir. 1972).

Although urging resolution of this case without reaching constitutional issues, *amici* do not attempt to elaborate on the nonconstitutional grounds for resolving this case. *Amici's* concern focuses instead on the issues raised by the First Amendment—which is relevant both indirectly, as a necessary background for the nonconstitutional issues, *cf. NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979), and directly, if the Court finds it necessary to decide the case on constitutional grounds. Butler's out-of-court communications with the press were speech in pure form, and any attempt to punish him for those communications can be permissible only if it meets the high standards that this Court has found the First Amendment to embody.

II. THE FIRST AMENDMENT PROHIBITS PUNISHMENT FOR OUT-OF-COURT COMMUNICATIONS IN THE ABSENCE OF EVIDENCE THAT THE COMMUNICATIONS CREATED A SERIOUS AND IMMINENT DANGER TO THE ADMINISTRATION OF JUSTICE.

The First Amendment serves the purpose of promoting the free discussion of matters of public interest. *See, e.g., Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964); *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940). In a well established line of cases, this Court has recognized that on occasion the interest of the public

in having the freedom to discuss pending proceedings and the issues they raise may conflict with the interest of the public in preserving the fair and orderly administration of justice. *See Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978); *Wood* v. *Georgia*, 370 U.S. 375 (1962); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Bridges* v. *California*, 314 U.S. 252 (1941). *See also, In re NBC*, 635 F.2d 945, 952 (2nd Cir. 1980); *United States* v. *Haldeman*, 559 F.2d 31, 69-70 (D.C. Cir. 1976) (per curiam) (en banc), *cert. denied*, 431 U.S. 933 (1977). This conflict comes into sharp focus where, as here, an individual is punished for having communicated about matters relating to a judicial proceeding.[1]

In resolving this conflict, this Court has established a standard that protects an individual's First Amendment freedom to speak by allowing punishment only in extremely limited circumstances. When balancing the interests of the administration of justice against the right to freedom of speech, a court must consider the particular communication at issue and the circumstances of its publication to decide whether "the substantive evil of unfair administration of justice" is likely to result and whether the degree of likelihood is sufficient to justify punishment. *Bridges* v. *California, supra*, 314 U.S. at 271. This Court has translated these general considerations into a working principle that sets a high hurdle in the path of any party seeking punishment for a communication. The working principle requires

> " 'that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished,' *Bridges* v. *California, supra*, at 263, and that a 'solidity of evidence,' *Florida* v. *Pennekamp, supra*, at 347, is necessary to make the requisite showing of imminence. 'The danger must

[1] This case does not present the situation that existed in *Seattle Times Co.* v. *Rhinehart*, ___ U.S. ___, 104 S. Ct. 2199 (1984), where a party wanted to release information obtained through compelled discovery and subject to a protective order. See p.13, n.2, *infra*.

> not be remote or even probable; it must immediately imperil.' *Craig* v. *Harney, supra*, at 376." *Landmark Communications, Inc.* v. *Virginia, supra*, 435 U.S. at 845.

A court must also consider whether other measures short of punishment will protect the interest in the administration of justice. *Id.* at 843.

In establishing this standard, this Court recognized the importance of the right to speak about pending proceedings. Matters that become the subjects of judicial, administrative or legislative review are often the controversies that command the most public interest and are regularly reported in the press. *See, e.g., Landmark Communications, Inc.* v. *Virginia, supra*, 435 U.S. at 839; *Bridges* v. *California, supra*, 314 U.S. at 268-69. And as this Court has stated, "[f]ree discussion of the problems of society is a cardinal principle of Americanism." *Pennekamp* v. *Florida*, 328 U.S. at 346. The threat of punishment, whether by disqualification, a finding of contempt or a lesser means, would severely abridge that discussion. *See Bridges* v. *California, supra*, 314 U.S. at 269.

In protecting the freedom to speak by restraining the judiciary's power to punish an individual for speech relating to a pending proceeding, this Court has rejected the notion that, absent unusual circumstances, the freedom to speak can be deterred by punishment until after a proceeding is finished in order to minimize any threat to the fair administration of justice. *See Pennekamp* v. *Florida, supra*, 328 U.S. at 346; *Bridges* v. *California, supra*, 314 U.S. at 268-69; *cf. Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 560-61 (1976).

When a proceeding is pending, and particularly as it moves toward or into trial, the interest in the integrity of the judicial process naturally is great and the temptation is to be protective, for example, by limiting what can be said about the proceeding in order to reduce the chance that a juror might be biased by what is said. However, it is at this point that public interest in the controversy is high and the freedom of individuals to speak and the press to publish has great value. Opinions about the underlying policy issues will be highly relevant, as will information about pretrial developments, such as what evidence is

admissible and inadmissible and what issues are and are not before the court in any proceeding. Coverage of the *Westmoreland* trial and the AT&T break-up proceedings is certainly of more value to the public when provided contemporaneously than after the fact. Consequently, the right of public expression cannot be delayed or deferred except in extraordinary circumstances. As this Court stated in *Bridges* v. *California:*

> "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. Yet, it would follow as a practical result of the decisions below [imposing punishments] that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted. . . . An endless series of moratoria on public discussion, even if each were very short, could hardly be dismissed as an insignificant abridgment of freedom of expression." 314 U.S. at 269.

The constitutional protection for speech relating to pending proceedings does not vanish when the speaker is an attorney. Although an attorney is an officer of the court and is subject to the ethical and disciplinary rules of his profession, the attorney does not waive the right as either a private citizen or an attorney to talk about issues pending before the courts. *See In re Halkin,* 598 F.2d 176, 186 (D.C. Cir. 1979); *Chicago Council of Lawyers* v. *Bauer,* 522 F.2d 242, 249 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976); *CBS Inc.* v. *Young,* 522 F.2d 234, 239 (6th Cir. 1975); *In re Oliver,* 452 F.2d 111, 114 (7th Cir. 1971); *Chase* v. *Robson,* 435 F.2d 1059, 1061 (7th Cir. 1970) (per curiam); *cf. Wood* v. *Georgia, supra,* 370 U.S. at 393-95.

Indeed, society has a strong interest in ensuring that the participants in legal proceedings, at least in the absence of constitutionally permissible protective or gag orders, are free to relay information and observations relating to those proceedings. "Since lawyers are considered credible in regard to

pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinion." *Chicago Council of Lawyers* v. *Bauer, supra,* 522 F.2d at 250; *see In re Halkin, supra,* 598 F.2d at 187; *Hirschkop* v. *Snead,* 594 F.2d 356, 373 (4th Cir. 1979) (per curiam) (en banc).

The public's interest in allowing informed individuals to speak is illustrated by the circumstances of the instant case, where a matter of health and safety of concern to a large sector of the public—the effects of a drug then actively being marketed—lay at the core of the suit. As Judge Robert Bork noted in another context:

> "Thousands of people are acutely concerned about [Bendectin's] safety. Because it was a matter of intense public debate whether the FDA should take action, and, if so, what kind of action, the controversy about Bendectin has a pronounced political component." *McBride* v. *Merrell Dow and Pharmaceuticals Inc.,* 717 F.2d 1460, 1466 (D.C. Cir. 1983).

In such circumstances, pendency of the suit as well as its outcome will be of interest to the public, and the attorneys involved often will be the most knowledgeable of the facts and pretrial status of the case and the most aware of the significance of the issues. Yet allowing a court to punish when no harm occurred and when no order prevented discussion would destroy the freedom of attorneys to speak either as professionals informed about the particulars of the proceedings or as citizens concerned about the issues in general and would deprive the public of valuable information.

The District Court did not apply the standard mandated by the First Amendment for determining whether punishment by means of disqualification was appropriate. In looking only at "whether the conduct of the attorney is so impermissible as to warrant the revocation of his admission *pro hac vice,*" the court did not assess or make findings about the seriousness of the potential harm, if any, created by the communication and whether the degree of imminence of the harm was extremely high. For this reason alone, this Court should uphold the reversal of the order disqualifying Butler.

III. THE DISTRICT COURT COULD NOT HAVE PROPERLY FOUND THAT BUTLER'S COMMUNICATIONS CAUSED A SERIOUS AND IMMINENT DANGER TO THE ADMINISTRATION OF JUSTICE.

If the District Court had applied the proper standard, the record is incapable as a matter of law of supporting a finding that Butler's communications with the press created a serious and imminent danger to the fair and orderly administration of justice. When Butler sent The Post a copy of his letter to Commissioner Hayes and the 14 DERs he had submitted to the FDA and was interviewed by The Post, three potential harms to the integrity of the judicial process in theory might have occurred. First, if Butler violated a constitutionally permissible court order not to speak or to distribute materials, the integrity of court orders could be threatened. Second, if Butler violated an enforceable Disciplinary Rule of the Code of Professional Responsibility, the enforcement of the standards of conduct of the profession could be at issue. Last, release to the public of information about a pending proceeding could create the possibility that individuals who might serve as jurors could not act as impartial decisionmakers at the trial—a concern that underlies the imposition of court orders and disciplinary rules about the dissemination of information relating to pending proceedings. Butler's actions, however, did not trigger any of these three potential harms. He did not violate, or "circumvent," any court order; he did not violate any Disciplinary Rule; nor did his actions interfere with Richardson-Merrell's right to a jury trial. The interest of the court and the public in protecting the judicial system against these concerns was not at jeopardy in the instant case.

A. Butler's Actions Did Not Violate Or Circumvent Any Court Order.

The District Court found, and Richardson-Merrell argues strenuously, that Butler's contact with the press, but apparently not his contact with the FDA, was a "flagrant circumvention" of the court's rulings on the admissibility of the DERs and evidence about the birth defects of Cordova and Sands. The distribution to the press of material that may have been the

subject of evidentiary rulings, however, does not violate or circumvent any order. An evidentiary ruling establishes whether the parties can present specific evidence to the jury once the jury has been selected and the trial has started. Unlike a protective order or gag order, it does not, either directly or indirectly, prevent the attorney or any other individual from speaking publicly about the evidence outside the courtroom.[2]

Richardson-Merrell impliedly proposes a rule of law that would restrain attorneys from discussing or disclosing any evidence held to be inadmissible. Every evidentiary ruling would carry a silent corollary prohibiting communications with the press about inadmissible evidence, the breach of which would expose an attorney to possible disqualification. Under such a regime, every evidentiary ruling might be considered a *de facto* gag order, or prior restraint, on communications with the press that would be insidious in its silence, offering no stated standard for conduct but carrying heavy sanctions. Rules governing the ability to communicate certainly cannot be implied but rather must be explicit and specific. *Cf. Hynes* v. *Borough of Oradell*, 425 U.S. 610, 620 (1976); *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). The restraint also would be grossly overbroad and uncontainable. If a communication with the press were prohibited, then communications with a government agency or a member of the public, which just as effectively could put the information in the public domain, would also have to be prohibited. Yet it may be of great public importance that individuals other than the press be able to discuss issues that are the subject of litigation as well as matters not covered by litigation due to evidentiary rulings or the narrowing of the scope of litigation.[3]

---

[2] An attorney's constitutional right to convey information may be limited if, unlike the circumstances in this case, the information was produced under the compulsion of a discovery order and the court has entered a protective order. See *Seattle Times Co.* v. *Rhinehart*, ___ U.S. ___, 104 S. Ct. 2199, 2209-10 (1984). In the instant case, Butler did not obtain the information he conveyed through the discovery process, and no protective order existed.

[3] Indeed, the District Court here seemed to sense the scope of this problem by expediently basing the punishment of Butler not on his letter to the FDA Commissioner, but rather on his sending a copy of the letter to the Post reporter.

Lastly, Richardson-Merrell's implied order would be inconsistent with the standards this Court has established for prior restraints. This Court has unequivocally established that prior restraints must overcome a heavy presumption of invalidity in order to survive constitutional scrutiny. *See Nebraska Press Association* v. *Stuart, supra,* 427 U.S. at 570. They can survive only if the court finds that the nature and extent of the publicity would distort the views of potential jurors, that alternatives to prior restraints would not sufficiently mitigate the effects of publicity, and that the restraint would effectively prevent the threatened danger. *See id.* at 562, 569.[4] Although punishable by disqualification rather than contempt, the rule Richardson-Merrell proposes would deter speech just as effectively. Richardson-Merrell cannot obtain the benefits of a prior restraint without bearing the heavy, fact-specific burden of proving that the order would pass constitutional muster.[5]

B. Butler's Actions Did Not Violate A Disciplinary Rule Of The Code Of Professional Responsibility.

Richardson-Merrell asserts that Butler violated the Disciplinary Rules of the District of Columbia Code of Professional

[4] This Court noted in *Nebraska Press Association* v. *Stuart, supra,* the suggestion that an alternative to a restraint on the press would be a court-imposed limitation on what participating attorneys could say about a pending criminal case. 427 U.S. at 564. The Court's comment, however, did not suggest that the substantive constitutional standards that could justify such an order would be less rigorous than those required to support other prior restraints. Such an order could be imposed only "in appropriate cases," *id.*, and therefore certainly not in every case, whether criminal or civil, in which evidence is ruled inadmissible. Also, such an order presumably would be issued in advance so the restrained individuals would know its scope and have an opportunity to object.

[5] The logical end result of Richardson-Merrell's position would be to make hearings about the admissibility of evidence in criminal and civil cases presumptively closed to prevent the press from publishing information about evidence ruled inadmissible. This consequence would be contrary to the Sixth Amendment's presumption that a suppression hearing will be open to the public, *Waller* v. *Georgia,* ___ U.S. ___, 104 S. Ct. 2210, 2216 (1984), and to the common law tradition of the openness of civil hearings. Similarly, court records describing or containing inadmissible evidence presumptively would be sealed, which would also be contrary to established common law. See *Nixon* v. *Warner Communications, Inc.,* 435 U.S. 589, 597 (1978).

Responsibility, but it does not elaborate or cite any support. The District Court did not find that Butler had violated any Disciplinary Rule; indeed, by stating that conduct short of a violation of a Rule may warrant disqualification, it implied strongly that he had not. *See* Pet. App. 75a.

Nor did the Court of Appeals find that he had violated a Rule. Instead, the Court of Appeals specifically found that Butler did not violate DR7-108(A) and (B)(1) of the District of Columbia Code of Professional Responsibility, which prohibit referring to inadmissible evidence at trial, and DR7-106(C)(1) and (C)(7), which prohibit direct extrajudicial communication with jurors. Pet. App. 52a. In its amended opinion the Court of Appeals avoided deciding whether Butler violated DR7-107(H), which discusses the scope of a lawyer's freedom to discuss pending civil litigation. *See* Pet. App. 71a. In its original opinion the Court of Appeals had found that no violation occurred. *See* Pet. App. 54a. Richardson-Merrell makes much of this change, insinuating that the court's hesitancy to decide the issue sprang from subsequent questions about Butler's behavior. In fact, the court's amendments seem intended to allow the court to avoid the constitutional question whether an additional standard should be read into DR7-107(H) to maintain its constitutionality—as it should since the trial court did not base its actions on DR7-107(H).

Given this record, this Court has no basis to find independently that Butler's activities violated the Disciplinary Rules and therefore created any harm, much less a serious and imminent danger to the administration of justice. Moreover, remand for a determination whether Butler had violated DR7-107(H) would be inappropriate because, as discussed below, an interpretation of DR7-107(H) that would justify penalizing Butler would be unconstitutionally vague and overbroad.

C. Butler's Activities Did Not Create A Serious And Imminent Danger That The Jury Would Be Prejudiced.

The last potential harm to the fair administration of justice would be the danger of jury prejudice—a danger that could also occur if an attorney violates orders prohibiting the release of information and disciplinary rules governing contacts with

the press. Butler's contacts with the press, however, created no serious or imminent danger that a jury could not render an impartial decision in the case.

Importantly, the District Court never found that publicity on the Bendectin issue had saturated the jury pool or that devices such as voir dire could not adequately protect Richardson-Merrell's right to a jury trial. The court pointed only to the fact that mention of the DERs appeared in *The Post* after the jury panel for the month of February had been drawn and that Butler's silence at the hearings implied that he intended to prejudice Richardson-Merrell's case. Pet. App. 77a-78a. These findings do not constitute the "solidity of evidence" required to support the conclusion that actual prejudice was a serious and imminent danger. *Landmark Communications, Inc.* v. *Virginia, supra,* 435 U.S. at 845 (citing *Pennekamp* v. *Florida, supra,* 328 U.S. at 347).

Nor, as the Court of Appeals determined, could the District Court have found that Butler had actually threatened Richardson-Merrell's ability to be judged by an impartial jury. *See* Pet. App. 54a-55a. Given that "even pervasive adverse publicity" will not inevitably result in an unfair trial, *Nebraska Press Association* v. *Stuart, supra,* 427 U.S. at 554, the article in *The Post* about various pending Bendectin cases and the 14 incidents Butler had reported to the FDA certainly would not have biased the jury pool against Richardson-Merrell. First, not all potential jurors would have seen the February 7th issue, and not all of those who did would have read the story, which did not even appear on the front page. Second, those who read the article would not have been prejudiced against Richardson-Merrell. The article discussed seven different lawsuits in which plaintiffs alleged that Bendectin had caused birth defects, but in doing so it presented both sides of the Bendectin issue with equal weight. In addition, the article did not focus primarily on the pending *Koller* case, allocating only three out of 23 paragraphs to the case midway through the article. When the case was mentioned, views of both sides were given. It is inconceivable that press coverage of this issue could have impaired the defendant's right to a fair trial by jury, much less just one balanced article, published in isolation and not in the midst of a publicity binge about the case. *See* J.A. 129.

Moreover, any threat to the administration of justice cannot justify punishment if other measures will protect the public's interest. *See Landmark Communications, Inc.* v. *Virginia, supra,* 435 U.S. at 843. In this instance, voir dire serves as a principal means of guaranteeing the impartiality of the jury. *See, e.g., Nebraska Press Association* v. *Stuart, supra,* 427 U.S. at 564. By probing potential jurors, voir dire can exclude those individuals who would not be able to render an impartial decision, not as Richardson-Merrell suggests, all those who read. *See Patton* v. *Yount,* ____U.S.____, 104 S. Ct. 2885, 2891 (1984); *Irvin* v. *Dowd,* 366 U.S. 717, 722-23 (1961). Early in the case, before Butler's communication with The Post, Richardson-Merrell recognized the role of voir dire, and it was fully prepared to screen out those individuals who had been biased by press coverage. Ten of the voir dire questions it submitted in December, 1982 focused on the effect of press coverage on potential jurors. J.A. 15-16. If a court and the parties cannot rely on voir dire to protect against prejudice in a case such as this one, where little publicity has occurred, they certainly could not proceed to try, as they do, criminal and civil cases attended by prominent and frequent coverage. *See, e.g., Nebraska Press Association* v. *Stuart, supra,* 427 U.S. at 562, 565; *CBS Inc.* v. *District Court,* 729 F.2d 1174, 1180-81 (9th Cir. 1984) (pretrial publicity in DeLorean case); *In re NBC,* 635 F.2d 945, 948 (2d Cir. 1980) (pretrial publicity in Abscam case); *United States* v. *Haldeman,* 559 F.2d 31, 61-62, 69-70 (D.C. Cir. 1976) (per curiam) (en banc), *cert. denied,* 431 U.S. 933 (1977) (pretrial publicity in Watergate case). *Compare Sheppard* v. *Maxwell,* 384 U.S. 333, 338-49 (1966).

In sum, neither the District Court's findings of fact nor the facts in the record can support the conclusion that Butler's contacts with the press jeopardized the fair and orderly administration of justice. Even if this Court were to review an attorney's out-of-court communications against a constitutional standard less protective than the serious-and-imminent-danger standard upon which *amici* rely, the result would be no different. Thus, as a matter of law, Butler should not have been disqualified for communicating with the press.

IV. ANY INTERPRETATION OF DISCIPLINARY RULE 7-107(H) THAT WOULD JUSTIFY DISQUALIFICATION HERE WOULD BE UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

Lastly, any interpretation of the Disciplinary Rule which resulted in a finding that Butler's conduct violated the rule would be unconstitutionally vague. This Court has a longstanding principle that governmental rules of conduct violate due process if they do not clearly define what activities are impermissible. Because individuals have a right to know what conduct will expose them to penalties so that they may conduct themselves accordingly,

> "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926).

See also Hynes v. *Borough of Oradell, supra,* 425 U.S. at 620; *Buckley* v. *Valeo,* 424 U.S. 1, 77 (1976); *Grayned* v. *City of Rockford,* 408 U.S. 104, 108 (1972); *United States* v. *Cardiff,* 344 U.S. 174, 176 (1952).

When the regulated activity involves First Amendment rights, as DR7-107(H) would in the instant case, an even greater degree of specificity is required. *See, e.g., Hynes* v. *Borough of Oradell, supra,* 425 U.S. at 620; *Buckley* v. *Valeo, supra,* 424 U.S. at 77; *Smith* v. *Goguen,* 415 U.S. 566, 573 (1974); *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 287 (1961); *Smith* v. *California,* 361 U.S. 147, 151 (1959); *Stromberg* v. *California,* 283 U.S. 359, 369 (1931). As this Court explained in *NAACP* v. *Button* when determining whether a statute governing the disbarment of lawyers for soliciting clients was void for vagueness,

> "[First Amendment] freedoms are delicate and vulnerable as well as extremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need

> breathing space to survive, government may regulate in the area only with narrow specificity." 371 U.S. at 433 (citations omitted).

Disciplinary Rule 7-107(H) fails to define with any specificity whether Butler's contact with the press was prohibited and would subject him to the serious potential sanctions for violations of disciplinary rules. The rule recites the text of Canon 20 of the Canons of Professional Ethics, and the inclusion of the Canon in the rule implies that the Canon was adopted as a rule. Unlike the other rules in the Code, however, it contains no mandates defining permissible or impermissible behavior.

In discussing prohibited contacts, DR7-107(H) states:

> "Newspaper publications by a lawyer as to pending or anticipated litigation *may interfere* with a fair trial in the Courts and *otherwise prejudice* the *due administration of justice. Generally* they are to be *condemned.*" (Emphasis added.)

Butler would have had no way of knowing which publications would be offensive and when they would be condemned—in short, how to interpret the italicized words in the rule.

The rule is similarly elusive when it addresses the circumstances under which a lawyer can make a statement to the press:

> "If the *extreme* circumstances of a particular case *justify* a statement to the public, it is *unprofessional* to make it anonymously. An *ex parte* reference to the facts *should* not go beyond quotation from the records and papers on file in court; but even in *extreme* cases it is *better* to avoid any *ex parte* statement." (Emphasis added, except "*ex parte.*")

Butler could not know by reading the rule the circumstances under which comment is allowed and whether the rule specifically prohibits certain conduct. Lacking the constitutionally required "precision of regulation," *NAACP* v. *Button, supra,* 371 U.S. at 438, the rule would be unconstitutional as applied to Butler.

An interpretation of Disciplinary Rule 7-107(H) in this case to justify Butler's disqualification would also be unconstitutionally overbroad. The government and courts cannot control conduct "by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964); *see Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973); *Thornhill* v. *Alabama, supra*, 310 U.S. at 97. Such an overly broad restraint is no "less pernicious than the restraint on freedom of discussion imposed by the threat of censorship." *Thornhill* v. *Alabama, supra*, 310 U.S. at 98 (footnote omitted).

If the general condemnation of statements to the press in DR7-107(H) were interpreted to encompass the protected speech that occurred in the instant case, it would be unconstitutional. As discussed above, speech can be punished in only extremely limited circumstances, which did not exist when Butler communicated with the press. Rather, taking a diametrically opposed position, the rule apparently subjects to punishment all statements to the press except those made in undefined "extreme circumstances." The Legal Ethics Committee of the District of Columbia Bar in effect concluded that the Rule was overbroad when it stated years ago that it would be "hesitant" to interpret the Rule in a way that would "thwart the communication of accurate factual information regarding legal proceedings to the press in the absence of a substantial threat to the due administration of justice." Formal Op. 8 (1975). The Court of Appeals seconded this conclusion when it called the Committee's Opinion "the proper interpretation." Pet. App. 54a. Thus, both the vagueness and overbreadth of DR7-107(H) as applied in this case would preclude a court from enforcing the rule against Butler.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeals' reversal of the District Court's order revoking Butler's *pro hac vice* appearance on the basis of communications with the press.

Dated: January 15, 1985.

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JAN 17 1985

ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARDSON-MERRELL INC.,

Petitioner,

v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF THE CASE	1
A. The Facts	1
1. The Incident Concerning Allis	1
2. The Incident Concerning Butler	14
B. The Opinion of the District Court	19
C. The Opinion of the Court of Appeals	21
SUMMARY OF ARGUMENT	26
ARGUMENT	27
I. THE DISQUALIFICATION ORDER WAS IMMEDIATELY APPEALABLE	27
II. THE REVERSAL OF THE DISQUALIFICATION ORDER WAS PROPER	38
A. The Ruling Respecting Allis' Disqualification	40
B. The Ruling Respecting Butler's Disqualification	41
CONCLUSION	50
APPENDIX	1a
District of Columbia Code of Professional Responsibility	
DR 7-101	1a
DR 7-102(B)	2a

TABLE OF AUTHORITIES

CASES

	Page
Abney v. United States, 431 U.S. 651 (1977)	29
Aetna Casualty & Surety Co. v. United States, 570 F.2d 1197 (4th Cir.), *cert. denied*, 439 U.S. 821 (1978)	32
Ah Ju Steel Co. v. Armco, Inc., 680 F.2d 751 (C.C.P.A. 1982)	32
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	39
American Protection Insurance Co. v. MGM Grand Hotel, 748 F.2d 1293 (9th Cir. 1984)	32, 45
Armstrong v. McAlpin, 625 F.2d 433 (2nd Cir. 1980) (*en banc*), *vacated on other grounds*, 449 U.S. 1106 (1981)	30, 32, 35, 44
Board of Education of New York City v. Nyquist, 590 F.2d 1241 (2d Cir. 1979)	22, 44, 45
Bose Corp. v. Consumers Union, —— U.S. ——, 104 S. Ct. 1949 (1984)	48
CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975)	48
Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268 (2d Cir. 1975)	34
Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1974), *cert. denied*, 427 U.S. 912 (1976)	47
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)	22, 27-28
Duncan v. Merrill Lynch, 646 F.2d 1020 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981)	30, 31, 32
Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981)	29, 31
Flanagan v. United States, —— U.S. ——, 104 S.Ct. 1051 (1984)	22, 27-28
Freeman v. Chicago Musical Instrument Co., 689 F.2d 715 (7th Cir. 1982)	30, 31, 32
General Mill Supply Co. v. SCA Services, Inc., 698 F.2d 704 (6th Cir. 1982)	32
Gibbs v. Paluk, 742 F.2d 181 (5th Cir. 1984)	29-30, 32
Gough v. Perkowski, 694 F.2d 1140 (9th Cir. 1982)	30, 31, 32
Groper v. Taff, 717 F.2d 1415 (D.C. Cir. 1983)	32
Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981)	39

TABLE OF AUTHORITIES—Continued

	Page
Hirshkop v. Snead, 594 F.2d 356 (4th Cir. 1979) (*en banc*)	48
In re Multi-Piece Rim Prod. Liab. Litig., 612 F.2d 377 (8th Cir. 1980), *vacated on other grounds sub nom. Firstone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981)	32
Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982)	40
Interco Systems, Inc. v. Omni Corpate Services, 733 F.2d 253 (2d Cir. 1984)	32
International Business Machines v. Levin, 579 F.2d 271 (3rd Cir. 1978)	32
J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357 (2d Cir. 1975)	34
Kahle v. Oppenheimer & Co., 748 F.2d 337 (6th Cir. 1984)	29, 32
Lefrak v. Arabian American Oil Co., 527 F.2d 1136 (2d Cir. 1975)	34
Melamed v. ITT Continental Baking Co., 592 F.2d 290 (6th Cir. 1979)	34
NAACP v. Button, 371 U.S. 415 (1963)	49
National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976)	40
Nebraska Press Association v. Stuart, 427 U.S. 539 (1976)	48
Norton v. Tallahassee Memorial Hospital, 689 F.2d 938 (11th Cir. 1982)	32
Panduit Corp. v. All States Plastics Manufacturing, 744 F.2d 1564 (Fed. Cir. 1984)	32
Pennekamp v. Florida, 328 U.S. 331 (1946)	48
People v. Ayers, 51 Cal. App. 3d 370, 124 Cal. Rptr. 283 (1975)	25
Pullman-Standard v. Swint, 456 U.S. 273 (1982)	39-40
Redd v. Shell Oil Co., 518 F.2d 311 (10th Cir. 1975)	34
Ruggieri v. Johns-Manville Products Corp., 503 F. Supp. 1036 (D.R.I. 1980)	48
Sacher v. United States, 343 U.S. 1 (1952)	45
Sheppard v. Maxwell, 384 U.S. 333 (1966)	48
State v. Kavanaugh, 52 N.J. 7, 243 A.2d 225, *cert. denied*, 393 U.S. 924 (1968)	43

TABLE OF AUTHORITIES—Continued

	Page
Taylor v. Hayes, 418 U.S. 488 (1974)	45
United States v. Wilson, 421 U.S. 309 (1975)	45
W.T. Grant Co. v. Haines, 531 F.2d 671 (2d Cir. 1976)	34, 44
Wood v. Georgia, 370 U.S. 375 (1962)	48, 49
Woods v. Covinton County Bank, 537 F.2d 804 (5th Cir. 1976)	34
STATUTES AND RULES	
Federal Rules of Civil Procedure 52(a)	39-40
28 U.S.C. § 1291	27-38
California Penal Code § 632(a)	25
California Penal Code § 632(c)	25
California Penal Code § 633.5	25
District of Columbia Code of Professional Responsibility	*passim*
DR 2-106(C)	31
DR 7-107(H) (Canon 20)	25, 43, 45-46
MISCELLANEOUS	
Bayer & Abrahams, *The Ethics of Moving for Disqualification of Opposing Counsel*, 13 Colorado Lawyer, Jan. 1984, at 55	34
Crocker, *The Ethics of Moving to Disqualify Opposing Counsel for Conflict of Interest*, 1979 Duke L.J. 1310	33
Hilliker, *Attorney Disqualification Motions*, 26 The Practical Lawyer, Oct. 15, 1980, at 11	34
Van Graafeiland, *Lawyer's Conflict of Interest—A Judge's View (Part II)*, N.Y.L.J., July 20, 1977, at 1	34
Comment, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts*, 45 U. Chi. L. Rev. 450 (1978)	33-34, 35
D.C. Bar Legal Ethics Committee, Formal Opinion 37 (1977)	31

BRIEF FOR RESPONDENTS

COUNTER-STATEMENT OF THE CASE*

A. The Facts

This is a suit by an infant child and her parents, the Kollers, against petitioner, Richardson-Merrell Inc., alleging that the child was born without arms and legs because of Mrs. Koller's ingestion during pregnancy of petioner's product, the drug Bendectin. In February 1983, nearly three years after the suit was brought, and shortly before trial was to begin, petitioner moved to disqualify the Kollers' primary counsel, Messrs. Allis and Butler, alleging two discrete acts of misconduct. The trial was postponed indefinitely, and for the next eleven months the case changed from an inquiry into petitioner's alleged wrong to a massive inquiry into the conduct of Allis and Butler. From the record thus amassed the material facts emerged essentially undisputed.[1] Petitioner's statement distorts that record, and thus we are compelled to set forth the facts in a comprehensive manner.

1. *The Incident Concerning Allis*

a. *The sequence of events.* A key element of the Kollers' claim was that Mrs. Koller had ingested Bendectin early in her pregnancy. Well before the events that are the subject of the district court's opinion, Allis had satisfied himself that this aspect of the claim was well-founded. Mrs. Koller had testified in two separate depositions that she had ingested Bendectin during the critical period (C.A. App. [Joint Appendix in Court of Appeals] at 1140-44, 1151-58, 1173-77). That testi-

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* The Appendix to the Petition in this case does not set forth the relevant language of District of Columbia Code of Professional Responsibility DR 7-101 and misstates the language of DR 7-102(B). Those Rules are set forth in the appendix to this brief.

[1] See Pet. App. 5a, n.6, 14a, n.27. As discussed *infra* at n.5, 18-19, 20-21 & n.19, there are at most two issues of disputed fact involved here. Neither issue was material to the decision of the court of appeals, and in neither instance did that court overturn the district court's finding of fact.

mony was corroborated by physicians' medical records made during her pregnancy (JA 147, 149; C.A. App. 1391-93), and by the testimony of her husband (J. Koller Dep. 1-22-82 pp. 89-91). In addition, Allis knew Mrs. Koller to be a person of the highest personal integrity, a nurse and Captain in the United States Army at the time of her pregnancy and a devoutly religious person whose life and career had been exemplary (JA 152-53, 301-02).

The district court disqualified Allis because of his "preparation and procurement" of a statement from his secretary, Krystyna Janowski (Pet. App. 72a, 75a). The entire sequence of events concerning the "preparation and procurement" of that statement took place within a 24 hour period. On December 26, 1982, at approximately 9 p.m., Allis received a phone call from Richard Daum, a paralegal employed by Allis' firm. Daum reported that Janowski had just called and said that George Barnes, petitioner's counsel's investigator, was pressuring her to sign a false statement that Mrs. Koller had told Janowski that she had never taken Bendectin in the first trimester of her pregnancy (JA 39, 170-71).

Unbeknownst to Allis, his secretary had been in regular contact with representatives of petitioner's counsel during the preceding four days.[2] Also unbeknownst to Allis, petitioner's counsel had made an *ex parte* communication to the chambers of the district court on December 23, 1982, informing the court that someone identifying herself as Allis' secretary was alleging that Mrs. Koller's claim was fraudulent (Pet. App. 11a, 73a; JA

[2] On December 22, Janowski had apparently called the offices of petitioner's counsel and stated that Mrs. Koller had not taken Bendectin during the critical period of her pregnancy (JA 19, 20). Beginning on December 23, Barnes, acting on behalf of petitioner, had made numerous contacts with Janowski (Barnes Dep. 1-25-83, pp. 70-71; Barnes Dep. 1-26-83, pp. 55, 74-77, 81-82, 120-21, 124, 130, 137), and had set up a daily surveillance of Janowski's apartment (JA 74, 271, 274-75, 276, 282, 284-85; Barnes Dep. 1-26-83, pp. 68-69). Additionally, during this period Janowski had met with Patrick Ryan, one of petitioner's attorneys (Ryan Dep. 2-26-83, Ex. 2).

21-22). At no point between December 22 and December 28, 1982, did petitioner's counsel notify Allis or his firm of petitioner's counsel's contacts with Janowski or of her allegations (JA 21-22, 198, 303).

Acting solely on the basis of what Daum had related, Allis set about on Monday morning, December 27, 1982, to learn what was going on. The furthest thing from Allis' mind was that the Kollers might have perpetrated a fraud upon the court; rather, he was concerned that petitioner was engaging in improper conduct, and he wished to get to the bottom of it to protect his clients' interests (JA 177-81).[3] At about 10 a.m., Allis called and spoke briefly on the phone with Janowski (C.A. App. 4311-12). She said that she could not take the pressure petitioner was putting on her, and that she was contemplating moving to Mexico (JA 171-72; C.A. App. 739). Allis told her that if petitioner was engaged in this kind of conduct it should be made known; Janowski should stay and state the facts (JA 171-72, C.A. App. 738-39). Janowski said that she would like to meet with Allis at the hospital, where she was visiting her prematurely born infant (Allis Dep. 2-14-83, pp. 161-62).

Allis immediately went to the hospital and talked with Janowski (JA 172). She reiterated what she had told Daum: that petitioner through Barnes was pressuring her to sign a false statement to the effect that Mrs. Koller had told Janowski that she had not ingested Bendectin during the first trimester of her pregnancy; and that Barnes had promised her that if she signed the statement petitioner would relocate her and take care of all her "wants and needs" including renting an apartment for her and her child (JA 26-27, 171-72, 178, 196). She made clear to Allis that in fact she had never had a conversation with Mrs. Koller relating to the latter's ingestion of Bendectin (JA 173-76, 178, 193, 226-27, 231-37, 243-44). Janowski told Allis that she would be happy to confirm this in a statement (JA 178).

[3] Allis was aware of questionable conduct by Barnes earlier in the case (JA 45-47, 172, 179, 301, 304; C.A. App. 555-58, 789).

During the conversation Janowski said things that led Allis to suspect that Janowski might have led petitioner on, and specifically that at some point she might have placed a call to petitioner's counsel.[4] But she denied telling anyone anything negative about the case (JA 173-76, 178, 193, 226-27, 231-37, 243-44). Nothing Janowski told him caused Allis any doubt about Mrs. Koller's veracity (JA 187, 213). Whatever Janowski might have told petitioner was, in Allis' mind, a reflection on Janowski's veracity and integrity, not Mrs. Koller's (JA 179). That afternoon, Allis' office placed a call to Mrs. Koller to inquire whether she had ever discussed with Janowski the subject of her ingestion of Bendectin. Mrs. Koller denied having had any such conversation with Janowski, and reiterated that she *had* taken Bendectin during the critical period (C.A. App. 652). Allis also learned that earlier that day Janowski had told her best friend that she was being offered $15,000 by petitioner to sign a false statement (JA 64; C.A. App. 668).

That afternoon, Allis reviewed the events with others in his firm (JA 174-75). It was decided that in light of Janowski's indication that she might leave for Mexico, Allis should act quickly to protect the clients' interests, by securing written confirmation of what Janowski had told him orally (JA 179-180).[5] With this purpose in

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[4] In the conversation at the hospital, Janowski expressed certain grievances respecting the way Allis' firm had treated her (C.A. App. 694), and asked him hypothetically what the significance would be if she had phoned petitioner's counsel (JA 174, 233).

[5] Petitioner attempts to make it appear that there is a conflict in the evidence concerning Allis' motivation in seeking the Janowski statement. Petitioner asserts that Allis knew at this point that Janowski had told petitioner's representatives that Mrs. Koller had not taken Bendectin during the first trimester, and that Allis' purpose in seeking the statement was to obtain a retraction of the statemen made to petitioner. There is "some dispute" as to when Allis learned what Janowski had told petitioner; there is no dispute as to Allis' motivation in seeking the statement. See Pet. App. 17a, n.34. Allis' precise testimony on the latter point was (JA 181):

mind, Allis decided upon the following: First, he would bring along Floyd Humphries, a trained investigator, as a witness (JA 179-80). Second, Humphries would bring a tape-recorder to the interview so that there would be no question as to what was said (JA 177). Originally, Allis had planned to ask Janowski to speak into the tape recorder. But ultimately he decided to do the recording without her knowledge so that it could not later be claimed that the recording was staged, and so that Janowski would speak in a relaxed and spontaneous fashion (*id.*). Third, he prepared a short, simple typed statement containing the basics of what Janowski had already told both Daum and himself (JA 180-81, 196-97).

At approximately 7 p.m. that evening, Allis and Humphries visited Janowski at her apartment. The transcript of the tape-recorded conversation is in evidence (JA 269-95). Janowski recounted her frustrations with Allis' firm over pay and parking problems; she then launched into a description of petitioner's harassment and intimidation of her. She described petitioner's offers of benefits to her. She reiterated that she knew nothing about Mrs. Koller taking or not taking Bendectin, and denied that petitioner had any reason to believe otherwise.

The following passages from the interview reflect its tenor:

> [Humphries]: Honestly, does [Barnes] still have any reasons to feel this—this idea that somehow ah you know or you said that Mrs. Koller talked to you:
>
> [Janowski]: No, he wants me . . . He will bet on somebody to say it. They don't give a hoot. [JA 279]. • • • •

THE COURT: Can you tell us whether [a retraction] was one of the primary purposes, because that's the question?

THE WITNESS: Certainly.

If she had made a statement to Davis, Polk, or to George Barnes that she had heard Cynthia Koller say she did not take Bendectin, certainly I wanted that, the truth, the true statement, the true facts, to be set down here. And that would involve a retraction of any statement like that, yes.

[Humphries]: Did you ever talk to Mrs. Koller?

[Janowski]: Well I've talked to her, but only, you know, to ask her if she wanted coffee and ah, you know, get her on the telephone for Nick Allis. [JA 279-80].

• • • •

[Janowski]: I have never had any conversation with Mrs. Koller—other than would you like some coffee . . . [JA 286].

• • • •

[Janowski]: All [Barnes] looks at is oh look at how terribly you live; and oh you poor woman, oh you poor . . . we can't let your little girl come into this situation. We'll find a beautiful apartment for you [chuckling while saying this]. [JA 278-79].

• • • •

[Janowski]: . . . They've been making tremendous promises about relocating me within twenty-four hours . . . . Really, it's been quite flattering. I've never had such attention. [Chuckling]. [JA 289].

• • • •

[Janowski]: It would have been fun to see what they were willing to pay for that statement. I mean, just for the hell of it! [JA 289].

After making minor corrections in the body of the statement Allis had prepared, Janowski signed it (JA 183, 197, 289-92). Contrary to petitioner's description (Pet. Br. 15), the tape shows that she devoted considerable attention to the text of the statement before signing it.[6]

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[6] After Janowski received the statement, she referred to the passage in the statement relating to the promises Barnes was making to her to induce her to sign a false statement: "[Janowski]: This is true. They've been making tremendous promises about relocating me within twenty-four hours . . . ." (JA 289). Next, she noticed that "They misspelled remuneration" (*id.*). Then she focused on the sentence that said she was hostile toward Allis' law firm the week before and said: "That was one of the reasons for my hostility, was that I felt that Sandra had been hired to replace me"

The statement contains the very points Janowski had been making orally throughout the interview—points that she had previously stated both to Daum and Allis. The statement reads as follows:

> Last week I was in the state of severe agitation and depression and felt a lot of hostility towards the law firm of Butler, Jefferson, Dan & Allis. Today I feel calm and my mind is free and clear. At no time did I ever hear Cynthia Koller or anyone else say that Cynthia Koller did not take Bendectin. George L. Barnes & Associates, Inc. had been trying to get me to sign a statement saying that I heard Cynthia Koller say that she did not take Bendectin. Such a statement would be false and I would not sign such a statement for that reason. Mr. Barnes and others have promised that if I signed such a statement they would be able to relocate me and would take care of all of my wants and needs including renting a comfortable apartment for me and by [sic] baby. Any conversation I had with George Barnes, Patrick Ryan or any other person from Davis, Polk & Wardwell or George Barnes & Associates was at a time when I was extremely upset and under *great* emotional stress. At the present time my mind is free and clear and everything in this statement is true and correct. I have been promised no remuneration of any kind by any representative of Butler, Jefferson, Dan & Allis for stating these true statements or for anything else. [JA 26-27].

Allis asked if Janowski were willing to make the statement under penalty of perjury, and she then added in her own handwriting, "Under penalty of perjury, I swear that the above-typed statement is true and correct" (JA 27, 184-85; C.A. App. 716).[7]

(JA 290). In the meantime, she made corrections on the statement: underlining the word "great", crossing out the word "feeling", and correcting typographical errors (JA 26-27).

[7] In addition to signing the statement, Janowski also handed Allis a document she had prepared previously (JA 28, 227-28). That document, Janowski told Allis, contained the "conversation"

Allis and Humphries left the meeting believing that the statement Janowski had just signed was true (JA 191, 203, 206, 210, 242-43, 302, 303). Allis had no fixed idea of what he was going to do with the statement (JA 303-04). That question was resolved by events of the next day, when Allis' firm received a copy of a letter that petitioner had sent to the district court, stating:

> On Wednesday, December 22, 1982 our office received two unsolicited telephone calls from a woman who identified herself as secretary to Mr. Nicholas Allis, one of plaintiffs' counsel. These two telephone communications were taken by receptionists at our office in New York City. The message as relayed was that she refused to work on the case because it is "fraudulent".
>
> We inquired of your law clerk whether it would be possible to arrange a conference before the Court closed for Christmas or whether we might have time to at least verify the identity of the caller. As I had indicated to your law clerk we did not then have any information as to her identity or the bona fides of the messages. Since then we have identified the caller as Mr. Allis' secretary.
>
> Having confirmed this, we arranged independent counsel for the person who communicated with us so that he might advise her with respect to the law of attorney-client communications and any possible duty to the Court.
>
> • • • •
>
> We respectfully request a conference with the Court so that it may, if it sees fit, prevent intrusion by any party or its counsel until the informant and her counsel have had an opportunity to evaluate the substance of her information and, if appropriate, inform the Court. [JA 21-22].

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petitioner wanted her to swear she had had with Mrs. Koller (JA 28). In this "conversation," Janowski observes that Mrs. Koller did not take Bendectin during the first trimester, and Mrs. Koller implicitly agrees (JA 28, 227-28).

This letter was the first communication Allis' firm received from petitioner regarding the Janowski matter.[8] This was also the first Allis' firm had heard of the so-called "independent" counsel that petitioner had "arranged" for Janowski.[9] Allis' firm immediately sent a responsive letter to the court, stating in part:

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[8] The suggestion in petitioner's brief (at 9) that Allis' firm may have received or known about the letter on Monday, December 27, is inconsistent with the undisputed record evidence. The letter may have been "hand-delivered" to co-counsel Eaton's office in Washington, D.C. late on that date. But Eaton testified that he first saw the letter "sometime prior to 9:19" a.m. on the morning of December 28 (JA 198). Eaton's phone logs indicate that at 9:19 a.m. on the 28th, he placed a call to Butler, who was at home in California, to inform him of the letter (Def. Hrg. Ex. 26). Butler testified to receiving that call "sometime around 6:00 o'clock in the morning" (JA 216). Later that day, a copy of the letter was delivered to Allis' firm.

[9] Janowski had mentioned a Mr. Schuck to both Daum and Allis, but she led them to believe that he was working with petitioner in its effort to obtain a statement from her, not that he was her attorney (JA 39-40, 224, 303). Schuck turned out to be petitioner's "independent" counsel. In fact, Schuck was paid by petitioner, not Janowski (JA 75-79); and Schuck's firm defended other pharmaceutical companies in birth defect litigation, including cases in which the plaintiffs were represented by Allis' firm (JA 32-33, 38). Subsequently, the Koller plaintiffs requested that the court appoint truly independent counsel for Janowski, offering to pay one-half of the cost of such counsel. The court denied the motion without a hearing (JA 32-33, 49-50). The court also ordered that Janowski not be questioned at her deposition about her relationship with Schuck, even though four people—including a former President of the Los Angeles County Bar Association—had submitted affidavits to the court stating that Janowski had told them Schuck was working with petitioner and pressuring her to sign a false statement (JA 33-35, 42, 48-49; C.A. App. 120-22).

After receipt of petitioner's letter, Allis and Butler treated Janowski as if she were represented by counsel, and felt obliged to communicate with her only through counsel (JA 241-42). Petitioner did not feel similarly restricted. On the very next day, Wednesday, December 29, Ryan, one of petitioner's lawyers, met with Janowski for the purpose of taking her statement (Barnes Dep. 1-26-83, pp. 81-82, Ryan Dep. 1-26-83, pp. 154-55). Ryan testified that he and lead counsel for petitioner, Lawrence E. Walsh, had

Based on the conversation of Mr. Allis with Ms. Janowski on Monday morning, a simple statement of what she had told Mr. Allis was prepared and given to her and signed by her, a copy of which is attached. . . .

Obviously this is a serious matter and it is my desire that the court have a hearing at the earliest possible date convenient to the court to decide what would be the proper course to follow. It is also requested that defendants be ordered to cease and desist their attempts to contact this secretary.

. . . With respect to the conversations alleged to have taken place with respect to Mrs. Koller, I have consulted with Mrs. Koller and to the extent of any purported conversation of Ms. Janowski with Mrs. Koller, we are willing to waive the attorney-client privilege as to any inquiry by the court or any independent counsel appointed by the court. Parenthetically, Mrs. Koller has again stated categorically that she took Bendectin during the sensitive period.

We view with extreme seriousness the manner in which defendant has sought to handle this matter by sending representatives repeatedly attempting to have our secretary sign a statement. It also concerns me that a call was made to the court without any notification to our firm regarding the nature of the call . . . .

We are very anxious to have this matter resolved quickly and we of course only wish the disclosure of the full truth. [JA 23-25].

At this point, the sequence of events pertinent to the issue of Allis' disqualification ended. Except as noted, *supra* at n.5, the evidence set forth above is uncontradicted. Petitioner, in an effort to create the appearance of evidentiary conflicts, has made numerous references in its brief to deposition testimony of Janowski. But the district court ruled that the question of disqualification would be determined without regard to whether anything said by Janowski was true or false or whether the statement she gave Allis was true or false (JA 156, 159, 164, 187-88, 247-48, 255, 257-58, 298-99). As petitioner correctly observed in the trial court: "[N]o portion of the evidence adduced by [petitioner] at the evidentiary hearing rested on the truthfulness of the December 27 statement signed by Ms. Janowski. [*Petitioner*] *did not call Ms. Janowski nor did it offer any of her deposition testimony in evidence.*" (JA 258, emphasis added; see also JA 187-88). Accordingly, Janowski's testimony is not part of the evidentiary record on which the district court made its decision. See also Pet. App. 14a, n.27.[10]

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determined it was unnecessary to contact Schuck before doing so (Ryan Dep. 1-26-83, pp. 141-42): ". . . I remember Judge Walsh saying, 'Well she has not accepted Mr. Schuck as her lawyer. She has made statements to the Butler firm, and it's perfectly alright for us to go forward . . .'" (*id.*, p. 141).

[10] Had Janowski's credibility been an issue in these proceedings, respondents would have presented a mass of evidence showing that the testimony now invoked by petitioner could not be credited. In fact, the record already contains ample evidence to establish that point. For example:

(1) By the time of her deposition in January 1983, Janowski had received from petitioner an apartment, rental car, legal assistance for herself and for her roommate's immigration problems, and other funds (JA 75-79, 140, 141, 334-38). In May and June of 1983, she testified that in addition she had received from petitioner $3,000 in cash, $1,500 worth of medical insurance, as well as other amounts of money (JA 334-38). "Funds come to me, I don't ask any questions. I just take the check and cash it" (JA 337). She also testified that well over $100,000 had been paid by petitioner to the "independent" counsel for her representation (JA 336).

(2) Janowski told at least six different people, including a close personal friend, the former President of the Los Angeles County Bar Association, and a former F.B.I. agent, essentially the same information as is contained in the sworn statement obtained by Allis (JA 33-35, 39, 40-44, 48-49, 64).

(3) Two days after the sworn statement to Allis, Janowski expressly asked representatives of petitioner for a bribe (JA 141, 330; Larsen Dep. 9-15-83, Ex. 15; Barnes Dep. 1-26-83, pp. 102-03).

(4) Janowski had a record of dishonesty while working for two other law firms, as well as in other dealings. In one instance, she

One postscript is worthy of note here. At a deposition of Janowski in mid-January 1983, "independent" counsel for Janowski stated on the record that petitioner was paying for Ms. Janowski's apartment, for her rental car, for her legal fees, for legal fees incurred by her roommate in connection with a separate matter, and for a

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had telephoned opposing counsel in a divorce case and made false charges regarding her firm's client (JA 167-69).

(5) Several months before Janowski's first contact with petitioner she had begun writing vitriolic letters to friends attacking Allis' law firm for alleged injustices to her with regard to pay and parking (Janowski Dep. 1-25-83, Ex. 17-26, 31-43).

(6) Janowski had a lengthy criminal background with a felony conviction and court-ordered psychiatric treatment, all previously unknown to Allis' law firm (JA 81-83).

The following excerpt from Janowski's testimony at a hearing in which she unsuccessfully sought unemployment compensation from Allis' law firm perhaps best sums up the point (JA 332-34):

> Q. Have you testified in the past that you have invented a web of lies in regard to the Koller situation?
>
> A. Yes.
>
> • • • •
>
> Q. Did you invent lots of things in regard to the Koller case....
>
> A. Yes, I did.
>
> • • • •
>
> Q. . . . Has the following question been asked you and you gave the following answer, "Isn't it a fact, Mrs. Janowski, that as you said yesterday, when you tell lies you can't keep them all straight?" and your answer, "Precisely, that's the problem I'm having now."?
>
> A. Yes, they were questioning me about previous lies and I couldn't remember what I said to whom.

Remarkably, in its brief to this Court, petitioner suggests that Janowski is a credible witness whose deposition testimony was not "shaken" on cross-examination (Pet. Br. 11, n.*). In fact, in that deposition cross-examination she admitted to a series of lies, false accusations, and threats too lengthy to enumerate (*e.g.*, Janowski Dep. 1-25-83, pp. 737, 739, 740, 741, 755, 849; Janowski Dep. 1-26-83, pp. 870, 888, 909, 955, 959).

variety of her living expenses (JA 75-79, 140, 141, 334-38; C.A. App. 1381-83; Barnes Dep. 1-26-83, pp. 43-44).[11]

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[11] Ironically, petitioner states (Pet. Br. 13) that the December 27 statement was "seriously misleading" in that it recites that "I have been promised no remuneration of any kind by any representative of Butler, Jefferson, Dan & Allis for stating these true statements or for anything else." Petitioner does not seem to contend that Janowski was promised any remuneration *for the statement*. There is no evidence to support such a contention, and the district court made no such finding. See Pet. App. 45a-47a. Rather, petitioner focuses on the phrase "or for anything else," and points to the fact that *after* the statement was signed Janowski arranged with Allis to have her roommate pick up her bi-weekly pay check and her check for unused 1982 vacation on Friday, December 31, the day the checks were due to be paid. Petitioner also points to the fact that Allis and Janowski discussed the possibility of having the firm deliver a typewriter to Janowski's home so that she could work at home while caring for her premature baby—a solution which two experts in legal ethics stated was "the ideal way" to handle the situation. See Pet. App. 46a-47a. But it was no secret that the firm compensated its employees, including Janowski, and neither Allis nor Janowski can plausibly be believed to have intended the statement to suggest otherwise.

Petitioner also complains (Pet. Br. 13) that the statement recited that Janowski's mind was "free and clear," whereas Allis believed her to be "a little bit emotionally unstable," "an emotionally somewhat unbalanced woman." But the district court did *not* find that Allis believed the recitation in the statement to be false. And the undisputed evidence shows that Allis in fact believed it to be true. He testified that he included the recitation in the statement after his meeting with Janowski at the hospital where she appeared to him to be calm (JA 228-30). Allis and Humphries also testified, and the transcript of the tape corroborates, that Janowski seemed relaxed and in good spirits during the interview that culminated in the signing of the statement (JA 208-09, 228-30).

In this connection, petitioner takes out of context (Pet. Br. 13) Butler's testimony that it would have been "reckless" to "call the court, or somebody else, and try to make representations as to what . . . Janowski's statement was" (JA 218). That testimony was in reference to the situation as it stood prior to Allis' obtaining the signed statement from Janowski; indeed, in context, Butler was explaining why he believed the appropriate first step was "to take Mr. Allis, a man whom she respected, . . . and to try to get [the truth] in a form that someone would be ready to accept" (JA 218).

b. *The character evidence.* At the hearing before the district court, six witnesses testified regarding Allis' character. These witnesses included a United States Court of Appeals judge (for whom Allis had been a law clerk), and the Attorney General of California (for whom Allis had worked). All testified emphatically that Allis is a person of the highest ethics and morals and is incapable of guile or cunning (JA 258-62).

c. *The expert testimony.* Two expert witnesses on the subject of legal ethics testified, David Austern and Thomas Lumbard.[12] Each had reviewed the record evidence respecting Allis' conduct (JA 306, 315), and each testified that Allis had acted ethically and properly in all respects (JA 305-22).[13]

2. *The Incident Concerning Butler*

On January 29, 1983, Butler sent a letter, dated January 28, to Commissioner Arthur Hayes of the Food and Drug Administration ("FDA"), stating in part:

> Because of the overwhelming importance of the enclosed documents, I am mailing them directly to you instead of the Medical Section of the [FDA]. These are Adverse Drug Reaction Reports on the drug Bendectin some 14 in number. Each of the cases represented a child who is horribly malformed and in each of the instances the mother took Bendectin during the sensitive period of organogenesis.
>
> • • • •
>
> It appears to me that solely on a humanitarian basis, the time has now come for the [FDA] to do something to warn the public of the dangers of Bendictin. . . . The previous information supplied to you by Congressman Doug Walgren . . . and particularly the studies of Dr. Crescitelli and Dr. Stuart Newman which demonstrates the mechanism of action of doxylamine succinate, the problem ingredient of Bendectin, seems to me to demand an immediate review by the [FDA] to take this noxious product off the market before it can do any more harm. [JA 134-35].

Butler sent copies of the letter and enclosures to the Surgeon General, and to Morton Mintz of the *Washington Post.* The cover letter to Mintz stated: "I have known and admired your articles on the drug industry and I thought that these [enclosures] might be of particular interest to you" (JA 341).[14] The only mention of the *Koller* litigation in the materials sent by Butler to Mintz is the following passage in Butler's letter:

> If you have any questions, I will be in Washington, D.C., from Sunday on at the River Inn. I also will be in court on the *Koller* case before Judge Norma Johnson on January 31 from 10:30am on. [JA 341].

On Tuesday, February 1, 1983, Butler received a phone call from Mintz and "gave him an interview regarding the contents of the material which had been mailed to the

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[12] Both Austern and Lumbard have studied, taught, and written on legal ethics. Austern served as Bar Counsel to the Board on Professional Responsibility of the District of Columbia Bar and subsequently as a member of that Board and of the Legal Ethics Committee of the District of Columbia Bar (JA 305-306). Lumbard was consultant, associate reporter, and then reporter to the Commission on Professional Responsibility of the Roscoe Pound American Trial Lawyer's Code of Conduct (JA 313-315).

[13] Austern and Lumbard also attempted to testify that the actions of counsel for petitioner were unethical or raised serious ethical questions in the following respects: a) providing remuneration to Janowski; b) failing to obtain truly independent counsel for Janowski; c) continuing to visit and talk to Janowski after arranging for counsel and after writing to the court suggesting that neither party contact her; d) failing to report a bribe solicitation from Janowski (see *supra*, notes 9, 10). The court would not permit this testimony and would not permit plaintiffs to make an offer of proof as to some of it (JA 306-07, 319-21; see also JA 323-24).

[14] Petitioner suggests (Pet. Br. 7) a sinister motive in Butler's choice of Mintz as the person to whom Butler directed a copy of his letter to the FDA. As Butler's letter to Mintz stated, Butler was aware of Mintz's prior writings and interest in the subject matter. The *Post* had previously carried articles dealing with Bendectin under Mintz's byline on February 11, 1980; August 23, 1980; September 16, 1980; September 17, 1980; February 6, 1981; June 25, 1982; August 19, 1982; and September 16, 1982.

Food and Drug Administration" (JA 250). The ensuing article's lone reference to the *Koller* case is the following:

> The plaintiff, Anne E. Koller, 3, has no arms, no right leg and a severely deformed left leg. She was born at Walter Reed Army Medical Center here but now lives in Broken Arrow, Okla.
>
> The company, formerly a unit of Richardson-Merrell, Inc., contends that "Bendectin has been used safely in over 31 million pregnancies," that "there has been no proof of any increase in the incidence of birth defects associated with its use," and that "there is no evidence that it caused Anne Koller's birth defects." In addition, a company spokesman said "there is a serious question when Mrs. Koller may have taken Bendectin." [JA. 129].

The only part of that passage that might have come from Butler is the descriptive material about Anne Koller. The rest of the passage reflects material that was apparently provided to Mintz by "a company spokesman." The 14 Adverse Drug Reaction reports are not referred to as such in the article; the article does refer to "14 cases"—seven where lawsuits had been filed and seven others where "[l]awyers have been retained." Brief descriptions are included as to some of the plaintiffs in these 14 cases. The remainder of the article describes the varying positions of the FDA, the Public Citizen Health Research Group, Butler, and the Merrell Dow Company respecting the dangers of Bendectin. The article's discussion of the dangers of Bendectin is balanced, and the article makes clear that the FDA and other groups believed that there was "no evidence to date establish[ing]" a causal connection between Bendectin and birth defects (JA 129).

At 10 a.m. on February 7, 1983, the morning the *Post* article appeared, petitioner filed a motion, with extensive supporting papers, seeking disqualification of Butler for his communication with the *Post* (JA 95-96, 131). From the timing, it is apparent that this motion had been prepared before the *Post* article appeared. In its papers, petitioner asserted: "[T]he publication of the information conveyed by Mr. Butler to the *Washington Post* will inevitably create unfair prejudice among some of the jury panel" (JA 96).[15]

In support of its motion, petitioner claimed that Butler's sending the materials to the FDA and to Mintz was inconsistent with certain pre-trial evidentiary rulings of the district court.[16] These rulings dealt solely with the question of admissibility of evidence at trial; none purported to restrict the release of this material to government agencies, the press, or the public. Petitioner had not sought, and the court had not granted, any order

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[15] In May 1983, a jury was selected in another case brought in the District of Columbia in which the plaintiff claimed a birth defect injury caused by Bendectin. The voir dire in that case disclosed that *no* prospective juror had any prior knowledge of any articles about Bendectin in the *Washington Post* or elsewhere (JA 323).

[16] On January 17, 1983, the court had excluded from evidence "drug experience reports" (DERs) relating to two malformed infants—Marco Cordova and Pauline Sand—on which expert witnesses for the Kollers had intended to rely in their testimony (JA 59-63). Materials relating to these two infants were among those furnished by Butler to the FDA and Mintz.

On October 19, 1982, the court had entered an order excluding "testimony or evidence" relating to petitioner's efforts to market the drug Thalidomide (JA 13; H.T. 10-13-82, pp. 28-31; H.T. 10-19-82, p. 3). The *Post* article contains a reference to Thalidomide for which Butler might have been the source (JA 129).

In another order, dated January 28, 1983, but filed January 31, 1983—which Butler did not know about when he wrote to Mintz but did know about when Mintz interviewed him—the court ruled that, of the hundreds of DERs on file with the FDA showing mothers who had taken Bendectin and then given birth to infants with absent or seriously malformed extremeties, the plaintiffs would be permitted to introduce into evidence only five—of plaintiffs' choosing—each of which must have been initiated within a year of the birth of the deformed child (JA 90-91). That order made clear, however, that the plaintiffs would be permitted to "elicit testimony concerning the number of DERs," thus permitting the jury to be informed of the "approximately five hundred DERs referring to Bendectin" (JA 85, 89). The material furnished by Butler to the FDA and Mintz on January 29 had included reports initiated more than a year after birth of the infant.

restricting communications with any outside party. No information in the case respecting the effects of Bendectin was under seal. All such materials in the record of the case were at all times accessible to the press and public.

At the time Butler sent the materials to Mintz, a pretrial hearing was scheduled for January 31, 1983, and the district judge "contemplated" that trial would be "in February or March" (JA 247). The jury had not yet been selected, although the overall jury pool for February trials had been enlisted.

The only evidence respecting Butler's motivation in sending the material to Mintz is contained in two affidavits submitted by Butler to the court. In his first affidavit, dated February 14, 1983, Butler stated (JA 137):

> I have examined all of the evidence concerning the drug Bendectin and discussed the matter with experts, and I am of the opinion that the evidence is overwhelming and that the drug undoubtedly is responsible for malformations in children, and that the sooner it is taken off the market, there will be less danger to the unborn. I have devoted the last two years of my life to an unceasing effort to see that this drug is removed from the market. In talking to the press, there was no motive other than to get the drug off the market.

In his second affidavit, dated May 29, 1983, Butler expanded on that point (JA 250):

> I never interpreted the various evidentiary orders cited by the court in the Order to Show Cause to be an order that would prevent me from communicating with the Food and Drug Administration or the press or any of the media. My discussions with Morton Mintz of the Washington Post was not intended in any way to have violated any court order made in the *Koller* case and was not intended in any way to influence any juror or potential juror. . . . I believe that the Bendectin controversy is a matter of high public importance and it must be brought to the attention to the government and to the public that the continuance of this drug on the market represents high risk to pregnant mothers and to the infants in utero . . . .

Butler also explained, in that second affidavit, the timing of his communication with the FDA and Mintz (JA 250):

> Research [by Butler] . . . regarding the 14 children was started as early as October 1982 with the obtaining of the medical records and accurate information concerning the children. The authorization[s] obtained for the release of the information to the Food and Drug Administration and the media [were] obtained during the month of January 1983.

Again there is a postscript to these events. Whether as a result of Butler's efforts or otherwise, petitioner announced on June 9, 1983 that it was stopping the production of Bendectin.[17]

B. The Opinion of the District Court

On January 6, 1984, the district court issued an order disqualifying Allis, Butler, and their firm from representing the plaintiffs in the *Koller* case. The court made *no* finding that either Allis or Butler had violated any ethical standard. Nor did the court find that the actions of these lawyers would in any way interfere with the ability of the court to conduct a fair trial in the *Koller* case. Rather, because Allis and Butler were appearing *pro hac vice*, the court believed it had the power to revoke their appearances without finding a defined act of wrongdoing. As the court put it, "conduct which may fall short of a violation of a Disciplinary Rule of the Code of Professional Responsibility may be sufficiently impermissible to warrant the . . . revocation of an attorney's pro hac vice appearance." Pet. App. 75a.

Pursuant to this broad assertion of power, the district court faulted Allis for "preparation and procurement" of the written statement of his secretary. Pet. App. 75a.

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[17] Petitioner's press release stated that the drug could cause no harm and that its discontinuance was required because Bendectin was a "victim of these litigious times" (JA 297).

The fault, the court said, was that Allis "zealously pursue[d] the interest of his clients" while neglecting his "duty and ethical obligation . . . to investigate whether Cynthia Koller was committing a fraud upon the court thereby making the suit worthless and a waste of judicial resources" (Pet. App. 76a). The court believed that Allis had a *duty* to the court to investigate a possible fraud by his client—even though the court did not find, and the evidence would not have supported a finding, that Allis lacked a reasonable basis for believing in the good faith of the Kollers' claim. That *duty*, the court stated, obliged Allis to abandon "pursuit of protecting the interests of his clients" in favor of "an investigation where the objective is to ascertain the truth and thereby to assist in preventing any acts of fraud upon the court" (Pet. App. 77a). Allis' failure to so abandon his clients' interests—his preparation and procurement of the statement from his secretary—"can be characterized as an attempt to thwart a true investigation of a crucial witness in this case in pursuit of protecting the interests of his clients" (*id.*).[18]

With respect to Butler, the court concluded that the release of information to Mintz was a "flagrant circumvention" of the court's evidentiary rulings. *Id.* "Butler's refusal of the Court's suggestion that he explain his actions during the hearings merely buttress the Court's conclusion that his release of the DERs to the media was

[18] On the assumption that Allis had a duty to investigate his clients, the court pointed to four aspects of Allis' conduct that made "evident" Allis' impropriety in preparing and procuring the statement (Pet. App. 76a-77a):

> 1) Allis' collaboration with Humphries to surreptitiously record a portion of his conversation with Janowski; 2) Allis' testimony under oath that he had no intention of informing the Court of the findings of his "investigation"; 3) Allis' failure to read the prepared statement line-by-line to Janowski to ensure that she understood the contents of the statement before signing; and 4) Allis' procurement of the statement irrespective of the erratic behavior displayed by Janowski during his visit on December 27.

calculated to prejudice the defendant's case and circumvent the Court's prior rulings" (Pet. App. 78a).[19]

C. The Opinion of the Court of Appeals

The *Koller* plaintiffs, as well as Allis, Butler and their law firm, took an immediate appeal from the district court's disqualification order, and moved to stay commencement of the trial pending resolution of the appeal. (The trial was imminent, and Butler and Allis were the only attorneys prepared to try the case).[20] The district

[19] As noted *supra* at 18-19, Butler's testimony was submitted in two affidavits. The court's reference is apparently to a colloquy in which the court inquired of Butler's counsel whether he "wish[ed] to present any witnesses" and counsel responded that "[w]e do not wish to present anything further" (JA 139).

[20] Petitioner repeatedly asserts that the Kollers "were represented by eight attorneys of record." *E.g.*, Pet. Br. at 3, 48. But the record is clear, and uncontradicted, that Butler and Allis had borne the primary responsibility for pre-trial preparation of the case and were expected by their clients and by their co-counsel to be the principal trial attorneys (JA 250-53, 331-32; C.A. App. 908-21, 1063.9-.11). Indeed, of the other six "attorneys of record" only two had any significant involvement in the case at the time of the events in question, and that involvement was strictly in a supportive role to Butler and Allis (JA 250-53, 331-32; C.A. 908-21, 926-27, 935, 1063.9-.11; H.T. 3-7-83, pp. 3-7, 12). The issues relating to liability in this case are of the greatest complexity, cutting across the fields of embryology, dysmorphology, chemistry, pharmacology, obstetrics, teratogenicity, epidemiology, neurology, and statistics. Butler and Allis had immersed themselves in the literature of each of these fields. They had found, interviewed, prepared, and attended the depositions of 17 or 18 expert witnesses who were to testify in the plaintiffs' case at trial; petitioner had identified as many as 80 expert witnesses to testify in petitioner's case, and Allis and Butler had undertaken the sole responsibility to prepare to meet the testimony of these experts at trial (C.A. App. 908-21; Dkt. No. 786, Eaton Aff., pp. 3-4). Butler stated that his work in the *Koller* case had consumed "at least 80 percent of the time [I have] devoted to the law practice in the last two years[.] I believe that I have personally worked at least 3,500 to 4,000 hours [in the case] and that Mr. Allis has worked at least 2,000 hours and that . . . paralegals and other people in the office worked at least another additional 1,000 hours" (JA 252; see also C.A. App. 911).

court denied the stay. Upon motion, the Court of Appeals granted a stay, and directed expedited consideration of the appeal. After briefing and argument, that court reversed the disqualification order.

At the threshold of its opinion, the Court of Appeals held that orders disqualifying counsel in civil cases are immediately appealable under the collateral order exception to the final judgment rule (Pet. App. 23a-33a). The court found each of the prerequisites of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), to be present. The court carefully considered this Court's decision in *Flanagan v. United States*, —— U.S. ——, 104 S.Ct. 1051 (1984) (holding a disqualification order in a criminal case not immediately appealable), and concluded that the considerations that led to the result in *Flanagan* are not present in civil cases.

Turning to the merits of the appeal, the court rejected the linchpin of the district court's holding: that, under the applicable local rules of court, "*pro hac vice* counsel, once admitted, are subject to disqualification more readily than regularly admitted counsel" (Pet. App. 34a-35a). "Particularly in the federal courts of the District of Columbia, we think it would be unwise to introduce into litigation an unwarranted disadvantage against parties with non-resident counsel by subjecting that counsel more readily to removal" (Pet. App. 35a).

At the urging of petitioner, the Court of Appeals proceeded to consider whether "the conduct of Allis and Butler provides adequate grounds for disqualification under the standards applicable to regularly admitted attorneys" (*id.*). Agreeing with the Second Circuit's approach in *Board of Education of New York City v. Nyquist*, 590 F.2d 1241 (1979), the court stated the following guiding principles (Pet. App. 38a-39a, & n.49):

> We agree that disqualification is warranted only rarely in cases where there is neither a serious question as to counsel's ability to act as a zealous and effective advocate for the client, . . . nor a substantial possibility of an unfair advantage to the current client because of counsel's prior representation of the opposing party . . . or prior responsibility as a government official . . . . Except in cases of truly egregious misconduct likely to infect future proceedings, other means less prejudicial to the client's interest than disqualifying the counsel of her choice are ordinarily available to deal with ethical improprieties by counsel.[49]

[49] For example, the court may issue a formal reprimand or, in more serious cases, a contempt citation either during or after the proceedings; it may also refer possible ethical improprieties to the disciplinary bodies of the local bar or, in the case of attorneys admitted *pro hac vice*, to the bar of the attorney's home state.

Applying these principles, the court concluded that Allis' actions "did not constitute misconduct" (Pet. App. 47a-48a). The court rejected the district court's premise that Allis had a duty to abandon vigorous pursuit of his clients' interests so that he could engage in a "true investigation" of whether his clients were committing a fraud on the court. The court explained:

> Counsel in both criminal and civil cases frequently face situations in which there is some evidence tending to cast doubt upon the credibility of the client or the validity of the claim. Yet the adversary system is based on the premise that the truth is better ascertained in such instances through the zealous and competent presentation by each side of its strongest case. The fundamental obligation of an attorney to his client—the bedrock principle of the adversary system—does not dissolve with the appearance of unfavorable evidence or even an allegation of fraud. The attorney's duty to the client is, of course, not without limits. In the familiar words of Canon 7 of the Code, "[T]he duty of a lawyer, both to his client and to the legal system, is to represent his client zealously *within the bounds of the law*," EC 7-1 (emphasis added). The legal profession continually struggles to define the point at which the attorney's

basic loyalty to the client must give way, for that point is very much at the heart of the adversary system. [Pet. App. 39a-40a].

The court determined the locus of that point by reference to the Disciplinary Rules of the Code of Professional Responsibility. Those rules require an attorney to act contrary to his client's interests only if he "knows or it is obvious" that evidence is false, or if he "receives information clearly establishing that . . . [h]is client has . . . perpetrated a fraud." The court reasoned:

> The Disciplinary Rules require objective and informed recognition by an attorney that specific evidence or a client's claims are fraudulent before imposing on the attorney an affirmative obligation to take actions that may be contrary to the interests of the client. An attorney faced with a potential conflict between the duty to the client and the duty not to perpetrate a fraud on the tribunal is entitled to rely on the standards of the Code of Professional Responsibility and should not be disqualified for conduct that falls within the general ambit of those provisions but does not violate the Disciplinary Rules. To permit disqualification for purported misconduct that falls short of a violation of these standards might well penalize conduct that could reasonably be deemed mandatory in fulfilling the duty to pursue zealously the interests of the client. [Pet. App. 40a-41a].

In evaluating Allis' conduct under the objective requirements of the Disciplinary Rules, the court accepted the factual findings of the district court and relied upon additional facts that were undisputed in the record of the case. The court concluded:

> In the absence of any finding—or indeed any evidence—that Allis knew or that it was obvious that Janowski's claims to him were false or his clients' case fraudulent, we can find no impropriety in his visit to Janowski for the purpose of obtaining a "retraction" of any damaging and, according to Allis' belief, false statements made to the defense. [Pet. App. 42a, footnote omitted].[21]

With respect to Butler, the Court of Appeals again accepted for purposes of its analysis the factual findings of the district court.[22] Although the district court had not found Butler to have violated any ethical standard, petitioner urged the Court of Appeals to find that Butler's conduct violated Canon 20, District of Columbia Code of Professional Responsibility DR 7-107(H), which deals with press comments by counsel in civil cases. The Court of Appeals expressed doubt that Canon 20 prohibited Butler's speech, and noted that significant constitutional

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[21] The Court of Appeals examined separately each of the four specific aspects of Allis' conduct to which the district court had referred, see note 18, *supra*, as well as two additional aspects of Allis' conduct not referred to by the district court but raised by petitioner on appeal. As to each, the court accepted the factual findings of the district court but found that the conduct was not improper. Pet. App. 43a-48a.

Petitioner suggests (Br. at 14 n.*) that taping the conversation with Janowski without her knowledge was unethical and may have violated § 632(a) of the California Penal Code. Neither assertion is correct. The conversation was not a "confidential communication" covered by § 632(a) as it was not "carried on in such circumstances as may reasonably indicate that any party to such communication desires it to be confined to such parties." Cal. Penal Code § 632(c); see also *id.* § 633.5; *People v. Ayers*, 51 Cal. App. 3d 370, 124 Cal. Rptr. 283 (1975). Janowski was aware that one of the participants in the conversation was a private investigator; and in the course of the conversation Janowski signed a statement that she knew might later be used in public proceedings. Nor were ordinary ethical limitations on tape recording applicable here. In rejecting petitioner's ethical challenge to the taping, the Court of Appeals relied on "the expert testimony that the use of a secret recording was proper under the peculiar circumstances Allis faced," Pet. App. 47a (footnote omitted)—testimony that took into account the bar opinions cited by petitioner. JA 309-10, 315-17.

[22] The court expressed doubt "as to the basis for the [district] court's finding that Butler's intent was to 'prejudice the defendant's case' and circumvent the [district] court's evidentiary rulings" (Pet. App. 51a). But the court's disposition made it unnecessary to decide whether that finding should be overturned. *Id.*

issues would be raised by a proscription of communications relating to issues of public importance transcending a particular case—here, whether the FDA should ban a drug from the market. Pet. App. 52a, 54a & nn.63, 65. But, applying the guidelines it had previously set forth, the court found it unnecessary to decide whether Butler had violated Canon 20 (Pet. App. 56a 71a):

> While Butler's decision to release the DERs to the press precisely when he did is not to be applauded, we do not believe that this record could support a finding that his conduct was likely to infect future proceedings. Under these circumstances, we cannot approve his disqualification, with the attendant prejudice to his clients, on the basis of this episode.

SUMMARY OF ARGUMENT

1. The disqualification order here satisfies each of the three criteria for appealability under the "collateral order" doctrine. The order conclusively determined the disputed question: Allis and Butler were removed from the case without any contingency or qualification. The order resolved an important issue completely separate from the merits of the action: the correctness of the order is an issue entirely distinct from the issues to be tried on the merits of the case and can be answered now without regard to the merits. The order would be effectively unreviewable on appeal from a final judgment: improper disqualification of counsel prior to trial has, for good reason, never been recognized as a basis on which to challenge a judgment on the merits in a civil case. The rationale of *Flanagan*—holding disqualification orders in *criminal* cases not appealable—does not apply here.

2. On the merits, the district court did not find that either Allis or Butler violated any ethical standard. That court believed that because Allis and Butler were appearing *pro hac vice*, it had the power to revoke their appearances without any finding of wrongdoing. The Court of Appeals rejected that assertion of power, and petitioner does not challenge that rejection in this Court.

The Court of Appeals also determined that under the standards applicable to regularly admitted attorneys, Butler and Allis could not, on this record, be disqualified. The court properly ruled that disqualification for "misconduct" is permissible only when (a) the attorney has committed a violation of legal or ethical norms, and (b) the violation is of a nature "likely to infect future proceedings" (Pet. App. 38a). The court did not overturn any of the district court's findings of fact. The court correctly determined that Allis' conduct was not a violation of any ethical norm; that determination was based on a construction of the Disciplinary Rules which is not challenged in this Court. The court correctly determined that there is no basis on this record for a finding that Butler's conduct was "likely to infect future proceedings," and thus found it unnecessary to decide whether Butler's conduct violated the Disciplinary Rule relating to attorney communications to the press. In any event, Butler's conduct did not violate that Disciplinary Rule; and, if, *arguendo*, that Rule prohibited Butler's speech, the Rule would violate the First Amendment.

ARGUMENT

I. THE DISQUALIFICATION ORDER WAS IMMEDIATELY APPEALABLE.

The threshold question in this case is whether the court of appeals had jurisdiction to entertain the appeal taken by the Koller plaintiffs and by Allis, Butler, and their law firm from the disqualification order entered by the district court.

Jurisdiction for that appeal was asserted under 28 U.S.C. § 1291, which provides, in pertinent part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." This Court has determined that § 1291 jurisdiction is not limited to "appeals only from those final judgments which terminate an action," *Cohen v. Beneficial Loan Corp.*, 337 U.S. at 545-46, for there is a

> small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction.

The criteria set forth in *Cohen* have more recently been refined by this Court as follows:

> First, [the order appealed from] "must conclusively determine the disputed question"; second, it must "resolve an important issue completely separate from the merits of the action"; third, it must "be effectively unreviewable on appeal from a final judgment." [*Flanagan v. United States*, 104 S.Ct. at 1055].

We show herein that the disqualification order in this case satisfies these criteria. We then show that the rationale of this Court's decision last Term in *Flanagan*—holding that orders disqualifying attorneys in criminal cases are not immediately appealable—does not support a like result in civil cases.

1. On the eve of a major, complex trial, the district court disqualified plaintiffs' principal counsel. The action of the district court placed the Kollers' case at a great disadvantage. Allis and Butler had devoted approximately 6,000 hours to preparation of the case, and were the only counsel prepared to present this complex case at trial (*supra*, n.20). At best, replacement counsel could replicate the trial preparation of Allis and Butler only after a lengthy period of concentrated work. Moreover, the action of the court was injurious to Allis and Butler. It deprived them of the opportunity to complete their professional service to their clients and put to waste a vast amount of their effort; and it cast a cloud over their standing in the legal profession.

The disqualification order here plainly meets the first criterion for appealability under the "collateral order"

doctrine: it "conclusively determine[d] the disputed question." Allis and Butler were removed from the case without any contingency or qualification. Nothing that would happen thereafter in the district court would undo that removal. *Cf. Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375-76 (1981).

Similarly, the second criterion of appealability unquestionably is met here: the order "resolve[d] an important issue completely separate from the merits of the action." That the issue is "important" is evident (see *supra* at 28). That the issue is "separate" is equally apparent. The merits of the action concern whether Bendectin caused Anne Koller to be born without arms and legs. The disqualification issue concerns whether the court may disqualify Allis and Butler based on Allis' "preparing and procuring" Janowski's statement and on Butler's communicating with the press. The disqualification issue turns on application and interpretation of the local rules of the district court, the local disciplinary rules for attorneys, and the limits on a trial court's power to supervise the conduct of civil trials. Measurement of the district court's order against these standards does not implicate resolution of any question going to the merits of the case. The correctness of the district court's order can be decided now. The disqualification issue is thus "collateral to, and separable from the principle issue at the . . . impending . . . trial." *Abney v. United States*, 431 U.S. 651, 659 (1977).[23]

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[23] There may be some cases, unlike this one, where the propriety of a disqualification order may depend upon knowledge of what ensues at trial. For example, the Sixth Circuit, in *Kahle v. Oppenheimer & Co.*, 748 F.2d 337 (1984), held that where disqualification is because counsel is needed as a witness at trial, the disqualification issue is " 'enmeshed in the factual and legal issues comprising the cause of action' " and thus is not "sufficiently 'independent' or separate to allow for appellate review until completion of trial." The *Kahle* Court did not "decide" whether the same result would follow in "civil cases where disqualification is based on misconduct, conflict of interests or other reasons." Only the Fifth Circuit, in *Gibbs v. Paluk*, 743 F.2d 181, 184-85 (1984), has ruled that

The issue of appealability under the "collateral order" doctrine thus comes down to the third criterion: the order "must be effectively unreviewable on appeal from a final judgment." The question posed is this: if replacement counsel tried the case on the merits, and there eventuated a judgment for petitioner or a damage award not satisfactory to the Kollers, would the Kollers be able effectively to appeal the judgment on the ground that the disqualification of Allis and Butler was improper? We are aware of no case, and petitioner has cited none, where improper disqualification of counsel prior to trial was recognized as a basis on which to challenge a judgment on the merits in a civil case.

In a civil case, "[t]he fact that counsel was improperly disqualified would not, in itself, be sufficient to warrant a new trial since . . . there is no presumption of prejudice which attaches to such disqualification." *Gough v. Perkowski*, 694 F.2d 1140, 1143 (9th Cir. 1982). And, our research has failed to disclose a single case where a court has considered, much less approved, a contention that a civil judgment should be overturned because a party's ability to put on his case was prejudiced by an order disqualifying his chosen counsel. The courts that have speculated on such a ground for a post-judgment appeal in a civil case have uniformly concluded that a post-judgment inquiry into prejudice would be "an exercise in futility," *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 719 (7th Cir. 1982), and "would impose an unrealistic burden on the courts," *Gough*, 694 F.2d at 1144. *Accord, e.g., Armstrong v. McAlpin*, 625 F.2d 433, 441 (2nd Cir. 1980) (*en banc*), *vacated on other grounds*, 449 U.S. 1106 (1981); *Duncan v. Merrill Lynch*, 646 F.2d 1020, 1025-27 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981); Pet. App. 29a. These decisions have

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disqualification orders in civil cases *per se* do not meet the second *Cohen* factor, and its opinion does not offer a defensible rationale for that ruling. See *id.* at 185-86 (Jolly, J., dissenting). All other Circuits have held that the second factor *is* met in the case of disqualification orders in civil cases. See *infra*, n.26.

recognized that such an appeal would necessarily turn on the subjective and standardless question whether disqualified counsel would have conducted the trial in a sufficiently superior manner to the performance of substitute counsel as to have altered the outcome of the litigation. Thus, if post-judgment appellate review of an order disqualifying counsel in a civil case were permitted, "[t]he argument in most cases would quickly degenerate into speculation and hindsight, and a proper decision would be extremely difficult, if not impossible, to arrive at." *Gough*, 694 F.2d at 1144.[24]

For these reasons,[25] the courts of appeals have uniformly reached the conclusion stated by the court below (Pet.

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[24] The decision in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981)—holding that an order *denying* a motion to disqualify opposing counsel is not subject to immediate appeal—is not to the contrary. The order in *Firestone* (refusing to disqualify a lawyer for the plaintiffs whose firm represented the defendant's insurance company in other matters) was found not to satisfy the third criterion of the "collateral order" doctrine. The Court reasoned that if the lawyer's dual interests harmed the *opposing party's* interests at trial—in a way that that party had standing to raise (see 449 U.S. at 379, n.14)—then the ruling would merge into the judgment and be a ground for challenging the validity of the judgment. That issue is different from whether a judgment is subject to attack simply because one lawyer, rather than another lawyer, tried the case.

[25] There are other reasons for concluding that a post-judgment appeal from a disqualification order in a civil case could not adequately protect the interests of those involved. Even if his former client prevails, the improperly disqualified attorney "is not likely to find any remedy for the damages to his reputation or to his pocketbook." *Duncan v. Merrill Lynch*, 646 F.2d at 1027; *accord, e.g., Freeman v. Chicago Musical Instrument Co.*, 689 F.2d at 720. Unlike the field of criminal defense, where contingent fees are prohibited, D.C. Code of Professional Responsibility DR 2-106(C), many civil cases are undertaken on a contingent basis as a matter of financial necessity. The erroneous disqualification of an attorney in a contingency case may well destroy the disqualified attorney's hope of ever obtaining compensation for the work he has put into a case. D.C. Bar Legal Ethics Comm., Formal Op. 37 (1977). See also Pet. App. 30a.

App. 30a): "it is clear that there can be no effective review at the end of the case."[26] That a civil case is tried by one counsel rather than another has never been understood to be a basis for overturning the judgment of the trial court.

Accordingly, the disqualification order in this case satisfies all three of the requirements for appeal under the "collateral order" doctrine.

2. *Flanagan* did not purport to change the criteria for determining when an order is appealable under the "collateral order" doctrine. Indeed, *Flanagan* restated and applied those criteria. See *supra* at —. The reasons which impelled this Court to find the order in *Flanagan* not immediately appealable are not applicable here.

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[26] Prior to *Flanagan*, the uniform view of the Circuits was that an order disqualifying counsel in a civil case is subject to immediate appeal. *Armstrong v. McAlpin*, *supra* (2d Cir.); *International Business Mach. v. Levin*, 579 F.2d 271, 277-78 (3rd Cir. 1978); *Aetna Casualty & Sur. Co. v. United States*, 570 F.2d 1197, 1200 (4th Cir.), *cert. denied*, 439 U.S. 821 (1978); *Duncan v. Merrill Lynch*, *supra* (5th Cir.); *General Mill Supply Co. v. SCA Serv., Inc.*, 698 F.2d 704, 706 (6th Cir. 1982); *Freeman v. Chicago Musical Instrument Co.*, *supra* (7th Cir.); *In re Multi-Piece Rim Prod. Liab. Litig.*, 612 F.2d 377, 378 (8th Cir. 1980), *vacated on other grounds sub nom. Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981); *Gough v. Perkowski*, *supra* (9th Cir.); *Norton v. Tallahassee Memorial Hosp.*, 689 F.2d 938, 941 (11th Cir. 1982); *Groper v. Taff*, 717 F.2d 1415, 1417 (D.C. Cir. 1983), *Ah Ju Steel Co. v. Armco, Inc.*, 680 F.2d 751, 752-53 (C.C.P.A. 1982).

After *Flanagan*, the court below in the instant case, the Second Circuit in *Interco Sys., Inc. v. Omni Corp. Serv.*, 733 F.2d 253, 254-55 (1984), the Ninth Circuit in *American Protection Ins. Co. v. MGM Grand Hotel*, 748 F.2d 1293 (1984), and the Federal Circuit in *Panduit Corp. v. All States Plastics Mfg.*, 744 F.2d 1564 (1984), have all, after considering the analysis in *Flanagan*, adhered to the view that an order disqualifying counsel in a civil case is immediately appealable. Neither *Kahle v. Oppenheimer & Co.*, nor *Gibbs v. Paluk*, discussed at n.23, *supra*, hold that there can be effective review of a disqualification order after trial; both cases turn on the second criterion for immediate review, not the third.

a. *Flanagan* rests heavily on factors peculiar to criminal litigation. The " 'policy [disfavoring prejudgment appeals] is at its strongest in the field of criminal law.' " 104 S.Ct. at 1054. Unlike a civil litigant, a criminal defendant is guaranteed a speedy trial by the Sixth Amendment. In addition, "there is a societal interest in providing a speedy trial" in criminal cases, because of concern for "the prosecution's ability to meet its burden of proof," "the cost of pretrial detention," "public anxiety over community safety," and the community's "strong collective psychological and moral interest in swiftly bringing the person responsible to justice." *Id.* These "compelling interest[s]" have led the Court to "interpret[] the requirements of the collateral order exception to the final judgment rule with the utmost strictness in crimial cases." *Id.* at 1055. But these interests, while "compelling in the administration of *criminal* justice," *id.* at 1054 (emphasis added), provide no reason to hold that disqualification orders in *civil* cases are not immediately appealable. Indeed, in the civil context, significant harm to the judicial process and to civil litigants would result if pre-trial appeals were *not* permitted. The court below succinctly explained why this is so (Pet. App. 27a, 57a):

> The tactical use of motions to disqualify counsel in order to delay proceedings, deprive the opposing party of counsel of its choice, and harass and embarrass the opponent has become so prevalent in large civil cases in recent years as to prompt frequent judicial and academic commentary. *See, e.g., Board of Education of New York City v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979); *Williamsburg Wax Museum v. Historic Figures, Inc.*, 501 F.Supp. 326, 331 (D.D.C. 1980), *aff'd sub nom. National Souvenir Center, Inc. v. Historic Figures, Inc.*, Nos. 82-2329, *et al.*, slip op. at 27-28 (D.C. Cir. Feb. 10, 1984); Crocker, "The Ethics of Moving to Disqualify Opposing Counsel for Conflict of Interest," 1979 Duke L.J. 1310; Comment, 45 U. Chi. L. Rev. 450

(1978).[27] We are aware of no comparable phenomenon in criminal cases. The apparent interest of many civil litigants in delaying adjudication and their use of disqualification motions to help accomplish that end militate in favor of immediate review of orders granting such motions. To insulate from prompt review an erroneous order granting a motion to disqualify counsel would only raise the stakes in this dangerous game.

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The disruption and delay of proceedings on the merits, such as we have seen in this case, are unhappily foreseeable byproducts of the injudicious use of disqualification motions by opposing counsel. We fear the intrusive potential of such motions would be exacerbated were orders disqualifying counsel not immediately appealable. In complex, costly product liability cases of this type, the plaintiff may have no realistic or comparable alternative to current counsel; counsel are not fungible.

Petitioner's behavior in this case is illustrative. Why has petitioner devoted massive and expensive resources to the time-consuming effort to have Allis and Butler dis-

[27] See also, *e.g.*, *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290, 295 (6th Cir. 1979); *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976); *Redd v. Shell Oil Co.*, 518 F.2d 311, 315 (10th Cir. 1975); Bayer & Abrahams, *The Ethics of Moving for Disqualification of Opposing Counsel*, 13 Colorado Lawyer, Jan. 1984, at 55; Hilliker, *Attorney Disqualification Motions*, 26 The Practical Lawyer, Oct. 15, 1980, at 11, 13-14; Van Graafeiland, *Lawyer's Conflict of Interest—A Judge's View (Part II)*, N.Y.L.J., July 20, 1977, at 1, col. 2.

Contrary to petitioner's suggestion (Br. at 27), the judicially noted misuse of motions to disqualify opposing counsel in civil cases has not been limited to motions based on alleged conflicts of interest. See, *e.g.*, *W.T. Grant Co. v. Haines*, 531 F.2d 671 (2d Cir. 1976) (questioning opposing party without counsel present); *Lefrak v. Arabian Am. Oil Co.*, 527 F.2d 1136 (2d Cir. 1975) (unsuccessful solicitation of additional plaintiffs); *J.P. Foley & Co. v. Vanderbilt*, 523 F.2d 1357 (2d Cir. 1975) (attorney as witness); *Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268 (2d Cir. 1975) (pre-litigation communication with opposing party).

qualified? The answer is that petitioner still hopes to separate the Kollers from the counsel of their choice—the only lawyers on the plaintiffs' side who have done the massive work necessary to try this complex case; has already gained a lengthy delay and disruption in the proceedings on the merits; and has become privy to privileged communications between the Kollers and their lawyers.

As the court below stated, to deny prompt appellate review in cases such as this "would only raise the stakes in this dangerous game." As there is no effective *post*-trial review, litigants would have the prospect of gaining a great tactical advantage through abusive motions to disqualify that, if successful in the district court, would be beyond correction. That prospect would magnify the incentives for filing such motions. Thus, in contrast to the criminal context, the consequences of holding that disqualification orders in civil cases may not be appealed would be contrary to the policies that undergird the final judgment rule: fostering "the efficient administration of justice" and restricting "the ability of litigants to harass opponents." *Flanagan*, 104 S.Ct. at 1054.[28]

b. The other predicate for the ruling in *Flanagan* also turns on a factor not present here. The defendants in *Flanagan* attacked the disqualification of their lawyers

[28] The frequent abuse of motions to disqualify opposing counsel in civil cases provides a further reason for distinguishing between the appealability of orders *granting* disqualification and orders *denying* disqualification. "Unlike appeals from orders granting disqualification, appeals from orders denying disqualification afford virtually unlimited possibilities for abuse." Comment, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts*, 45 U. Chi. L. Rev. 450, 466 (1978). When a trial court has *denied* a motion to disqualify, "an appeal might significantly delay the trial and might be taken on wholly spurious grounds." *Id.* at 464. By contrast, the party seeking to overturn an order *granting* disqualification in a civil case, unlike the motion's proponent, typically has no interest in unduly prolonging the litigation. "Thus, it is far less likely that appeals from orders granting disqualification motions will be taken purely for tactical reasons." *Armstrong v. McAlpin*, 625 F.2d at 441.

on two constitutional grounds: "their Sixth Amendment right to assistance of counsel and . . . their Fifth Amendment due process right to present a common defense through joint counsel." 104 S.Ct. at 1053. It was clear that these constitutional challenges could be asserted on appeal after a conviction as grounds to set aside the conviction. As this Court stated, the constitutional rights asserted in *Flanagan* are, "like virtually all rights of criminal defendants, merely [rights] not to be convicted under certain circumstances." *Id.* at 1056.

Flanagan did not determine the elements a criminal defendant would have to establish in order to upset a conviction on either of these grounds. The Court decided that whatever the elements of these constitutional claims, one or another of the criteria for immediate appealability would not be satisfied. If these rights are like other Sixth Amendment rights, "[o]btaining reversal [of a conviction] for violation of such a right [would] not require a showing of prejudice to the defense, since the right reflects constitutional protection to the defendant's free choice independent of concern for the objective fairness of the proceeding." *Id.* On that assumption, "a pretrial order violating the right does not meet the third condition for coverage by the collateral order exception: it is not 'effectively unreviewable on appeal from a final judgment.'" *Id.* *Flanagan* continued (*id.* at 1056-57):

> If, on the other hand, [the] right is one that is not violated absent some specifically demonstrated prejudice to the defense, a disqualification order [in a criminal case] still falls outside the coverage of the collateral order exception. . . .
>
> On this assumption, a disqualification order, though final, is not independent of the issues to be tried. Its validity cannot be adequately reviewed until trial is complete. . . . In these circumstances the second . . . condition for immediate appealability as a collateral order is not satisfied: the disqualification order does not resolve an "issue completely separate from the merits of the action."

Flanagan thus turned on the nature of the constitutional rights being asserted in that case—rights "not to be convicted under certain circumstances." By definition, those rights could not be violated unless and until a conviction occurred. Depending on whether a showing of prejudice is an element of establishing a violation of those rights, a claim of violation is (as the court below put it) "either fully reviewable on completion of the trial or *not* fully reviewable *until* the completion of the trial" (Pet. App. 32a).[29]

The constitutional rights invoked in *Flanagan* do not exist in the civil context. The rights invoked here derive from a different source. Here the right of the clients to be represented by the counsel they have retained and the right of the attorneys not to have their clients taken from them are defined and limited by the local rules of the district court, the local disciplinary rules, and the inherent power of courts to supervise civil cases. Those rights exist without regard to whether their violation would affect the outcome of the case. A showing of prejudice to the case is not an element of establishing a violation of these rights, and a violation is not effectively reviewable after trial. Thus, the *Flanagan* dichotomy does not exist here,[30] and all the criteria for a "collateral order" are satisfied.

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[29] Implicit in the *Flanagan* Court's formulation is the possibility that if the constitutional rights invoked there require a showing of prejudice at trial—and thus do not satisfy the second criterion for a "collateral order"—there may be no effective post-judgment appeal of the claim. The possibility that there is neither pre-judgment nor effective post-judgment review of an order inheres in the three-criterion test for a "collateral order", for "effectively unreviewable" is only one of the criteria that must be met. The ruling in *Flanagan* thus does not imply that a post-judgment appeal from a disqualification order, where the appellant must show prejudice, would enable effective review of that order.

[30] The analysis in *Flanagan* of the three criteria for appealability was entirely in the context of the constitutional rights invoked there. That case did not involve a claim that a disqualification order was improper for non-constitutional reasons. But the rule announced by the Court was broader than the particular claims

II. THE REVERSAL OF THE DISQUALIFICATION ORDER WAS PROPER.

Orderly treatment of petitioner's challenges to the merits of the decision below requires that these challenges be placed in the proper framework. Contrary to the premise of petitioner's first question presented, the district court did not find either Allis or Butler "guilty" of any violation of ethical standards. The district court believed that because Allis and Butler were appearing *pro hac vice*, it could revoke their appearances without any finding that they had committed a defined act of wrongdoing. The court of appeals rejected this legal standard, holding that, under the applicable local rules, "*pro hac vice* counsel, once admitted, are [not] subject to disqualification more readily than regularly admitted counsel" (Pet. App. 34a-35a). Petitioner has not challenged that ruling in this Court.

In the court below, *petitioner* requested that the court of appeals decide what the district court had not: whether Allis and Butler could be disqualified under the standards applicable to regularly admitted attorneys (*id.* at 35a). The court below undertook that inquiry and determined that under the proper standards neither Allis nor Butler could be disqualified. In reaching that determination, the court did not hold, as petitioner's brief suggests, that attorney misconduct cannot be a basis for disqualification. Rather, the court ruled that a trial court has power to disqualify an attorney for "misconduct" only when (a) the attorney has committed a violation of legal or ethical norms and (b) the violation is of a nature "likely to infect future proceedings" (*id.* at 36a-38a). Applying this standard, the court determined that Allis could not be disqualified, for he had committed no misconduct, and that Butler could not be disqualified because even if his communication to Mintz had violated an ethical standard—and the court did *not* decide that question—the record did not permit a finding that that conduct was "likely to infect future proceedings" (*id.* at 56a, 71a).

In making those determinations, the court stated the standard of review as follows:

> The district court has wide discretion in the exercise of its duty to supervise members of the bar appearing before it. See *Groper v. Taff*, 717 F.2d at 1418. In reviewing the court's decision, we are bound to accept the court's findings on disputed issues of fact unless they are clearly erroneous. The district court's conclusions of law, including its interpretation of the Code of Professional Responsibility, and its application of the law to the facts are of course subject to appellate review for legal error. [*Id.* at 33a-34a].[21]

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analyzed: "a District Court's pretrial disqualification of defense counsel in a criminal prosecution is not immediately appealable under 28 U.S.C. § 1291" (104 S.Ct .at 1052). By its terms, this rule would preclude pretrial appeal of a disqualification order in a criminal case that is attacked on non-constitutional grounds. But that result could not be justified by *Flanagan*'s analysis of the appealability of a constitutional claim—which either would be effectively reviewable after trial or would require a showing of prejudice at trial. The non-constitutional grounds in a criminal case, as here, have neither of these attributes. Therefore, if *Flanagan* intended a rule that would encompass such grounds, that outcome would have to be a function of the other factor that was heavily relied on in *Flanagan*: the "compelling interest" in the criminal justice system against pretrial appeals. See *supra* at 33.

[21] Thus, contrary to petitioner's contention (Pet. Br. at 31-34), the court did not foreswear the abuse of discretion standard. The court simply recognized that the trial court's discretion is not boundless. A trial court does not have discretion to disqualify an attorney for any reason whatsoever. Its discretion begins only when there exist facts that, under the controlling legal standard, establish that disqualification is a course of action available to the district court in the exercise of its discretion. The purport of the court's opinion is simply that when the power of a trial court to exercise discretion depends on a finding of fact or a conclusion of law, then the former is subject to review under the clearly erroneous standard and the latter is subject to review for legal error. See, *e.g.*, *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975).

That result is hardly surprising. As this Court stated in *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982): "Rule 52(a)

The court was meticulous in following the "clearly erroneous" rule throughout its opinion; the court accepted for purposes of its analysis all of the district court's findings of fact, and cited additional facts only when the evidence was undisputed. See, *e.g.*, *id.* at 5a n.6; 6a nn.9, 11; 14a n.27; 17a n.34; 42a-44a; 71a.

A. The Ruling Respecting Allis' Disqualification

In ruling that Allis' conduct was not improper, the Court of Appeals did not disagree with the district court's *factual* findings. The material facts respecting Allis' "preparation and procurement" of a statement from his secretary are undisputed in the record before the Court. See 1-14, *supra*. Rather, the Court of Appeals premised its decision on its interpretation of the nature of the legal duties imposed by the Code of Professional Responsibility.

As discussed *supra*, at 20-21, the basis of the district court's dissatisfaction with Allis was its view that, under the circumstances he encountered, Allis was obliged to abandon "pursuit of the interests of his clients" in favor of "an investigation where the objective is to ascertain the truth and thereby to assist in preventing any acts of fraud upon the court" (*id.* at 77a). This is the "true investigation" that the district court found Allis had "attempt[ed] to thwart" by "pursuit of protecting the interests of his clients" (*id.*). But as the court of appeals explained, Allis had no obligation in the circum-

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broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from [that standard of review]." And it is elementary that the interpretation of a rule, for example a Disciplinary Rule of the Code of Professional Responsibility, should be reviewed on the basis of legal error—*i.e.*, whether or not the interpretation is correct. A trial court is not given discretion to interpret such rules; the rules have a meaning, and the trial court's conclusion as to that meaning is either correct or incorrect. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 695-707 (1982), and *National Hockey League v. Metropolitan Hockey Club., Inc.*, 427 U.S. 639 (1976), which are cited by petitioner, are wholly consistent with this analysis.

stances he encountered to abandon "pursuit of the interests of his clients" or to assist the court in an "investigation" of his clients' *bona fides*. On the contrary, because he did not have an "objective and informed recognition" that his clients' claim was fraudulent, the Disciplinary Rules required only that he pursue his clients' interests "zealously" (*supra*, at 23-24). And, the court concluded, as petitioner virtually conceded below, that Allis' securing his secretary's statement was entirely consistent with the Disciplinary Rules (*supra*, at 24-25).[32]

The only factual predicate for that legal conclusion is undisputed: at the time Allis "prepar[ed] and procur[ed]" the statement, he did not have an "objective and informed recognition," as defined by the Disciplinary Rules, that his clients' claim was fraudulent. Allis believed, and had more than a reasonable basis to believe, that the Kollers' claim was well-founded. Indeed, Janowski was giving Allis reason to believe that petitioner—and possibly Janowski herself—were engaged in misconduct, not that his clients were so engaged.

The reversal of Allis' disqualification thus was predicated entirely upon two legal rulings, neither of which is challenged in this Court: (1) *pro hac vice* attorneys are not subject to disqualification on grounds not applicable to regularly admitted attorneys, and (2) absent "objective and informed recognition" that a client's claims are fraudulent, an attorney is entitled, indeed obliged, to pursue those claims zealously.

B. The Ruling Respecting Butler's Disqualification

Butler was disqualified for providing information to the press germane to an issue of great public importance that transcended the Kollers' lawsuit. Bendectin was on the market. Pregnant women were ingesting the drug.

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[32] In the court below, "[i]n oral argument defense counsel conceded that, given what Allis knew on December 27, it was proper, and perhaps even required by his duty to the Kollers, for him to visit Janowski and probably to take some kind of a statement" (Pet. App. 44a).

Butler believed the drug was dangerous. He sought to get the FDA to act. He furnished both the FDA and Mintz information that supported his position. No order of the district court purported to prohibit him from doing so: the information transmitted by Butler to Mintz was not under seal; nor was it covered by any order restricting communications to the press. See *supra*, at 17-18.

The district court did not find Butler to have violated any ethical norm, and did not even mention, much less invoke, the Disciplinary Rule asserted by petitioner on appeal as justification for the disqualification. Nor did the court find that the *Post* article—which gave a balanced presentation of the debate over whether Bendectin is dangerous (see *supra* at 16)—would in fact prejudice the trial. And the court did not find that Butler had demonstrated an unwillingness to conform to orders of the court or ethical standards such that the integrity of the trial would be jeopardized.

The district court based its action solely on the finding that Butler's communication to Mintz was a "flagrant circumvention" of the court's *evidentiary* orders, and that "Butler's refusal of the Court's suggestion that he explain his actions during the hearings merely buttress[es] the Court's conclusion that his release of the DER's to the media was calculated to prejudice the defendant's case and circumvent the Court's prior rulings" (Pet. App. 77a-78a). The court of appeals questioned this finding:

> The court heard no live testimony on this issue; in particular it heard no testimony contradicting a plausible explanation contained in Butler's affidavit for the timing of the release—that he had not received the parents' authorizations to release the information until January. We do not believe that the court could reasonably conclude from Butler's failure to testify voluntarily that he was lying in his affidavits as to his motivation. In light of this explanation, together with Butler's amply demonstrated concern over the safety of Bendectin, the peculiar timing of Butler's release of information does not provide unambiguous support for the court's finding of bad intent. [*Id.* at 51a].

But the court of appeals found it unnecessary to decide whether the district court's finding was clearly erroneous. And, the court found it unnecessary to decide whether Butler's conduct constituted a violation of the Disciplinary Rule relating to press communications. Rather, applying the second part of its legal test for disqualification, the court determined that the record would not support a finding that Butler's conduct was "likely to infect future proceedings" (Pet. App. 54a, 56a, 71a), where: (i) Butler's conduct was not "anywhere near equivalent to a violation of a court order" (*id.* at 52a); (ii) Butler's conduct was at least arguably not a violation of any ethical standard (*id.* at 53a, 54a); (iii) Butler's conduct was at least arguably protected by the First Amendment (*id.* at 52a, 54a); (iv) the *Post* article was balanced and was published prior to the assignment of jurors to the case (*id.* at 55a); and (v) there was no basis for finding that "voir dire, a process designed in part to protect against prejudicial publicity, would be inadequate to discover and remove jurors influenced by the Mintz article" (*id.*).[33]

We show below: (1) that the standard for disqualification applied by the court below is appropriate; (2) that, in any event, Butler's communication to Mintz did not violate Canon 20; and (3) that Butler's expression was protected by the First Amendment.

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[33] Even if, *arguendo*, Butler's communication to Mintz violated Canon 20 of the ABA Canons of Professional Ethics, which has been adopted as part of the D.C. Code of Professional Responsibility, DR 7-107(H), the first three factors listed in text preclude any finding that Butler's behavior manifested an unwillingness to "'stay in bounds' in the future [or] that subsequent disciplinary proceedings would be inadequate to protect the integrity of the judicial process" (Pet. App. 56a, distinguishing *State v. Kavanaugh*, 52 N.J. 7, 243 A.2d 225, *cert. denied*, 393 U.S. 924 (1968)).

1. *The standard for disqualification.* As discussed *supra*, at 22-23, the court below recognized that certain attorney conduct by its nature may disturb "the balance of presentations" in the underlying trial and warrant disqualification—*e.g.*, where an attorney has a conflict of interest, or has previously represented the opposing party, or must testify as a fact witness at trial. Pet. App. 36a-38a. The court determined that aside from such situations, "[e]xcept in cases of truly egregious misconduct likely to infect future proceedings, other means less prejudicial to the client's interest than disqualifying the counsel of her choice are ordinarily available to deal with ethical improprieties by counsel" (*id.* at 38a).[34] Thus, in such cases, to justify disqualification of an attorney a court must find not only that the attorney engaged in misconduct but also that the misconduct is "likely to infect future proceedings."

Contrary to petitioner's argument, this standard is not a departure from the long-standing recognition that trial courts must be adequately empowered to protect the integrity of the trial process. Rather, the standard evolved in a series of Second Circuit decisions precisely as a means, on the one hand, to preserve that traditional and necessary power, and, on the other, to protect the integrity of the trial process against a different, and growing, evil: the tactical abuse of motions to disqualify opposing counsel as a means to delay and disrupt civil litigation, to probe into the confidential communications and strategies of an adversary, and to deprive a party of the counsel of its choice.[35] See *supra* at 33-35. The trial court's interest in the integrity of the proceedings before it is the very focus of the inquiry. If an attorney's con-

[34] The court listed formal reprimand, contempt citation, and referral to disciplinary bodies of the bar as examples of such "other means" (Pet. App. 38a-39a, n.49).

[35] See, *e.g.*, *W.T. Grant Co. v. Haines*, 531 F.2d 671, 676-78 (2d Cir. 1976); *Board of Education v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979); *Armstrong v. McAlpin*, 625 F.2d at 444-46.

duct is *not* "likely to infect future proceedings," then the integrity of those proceedings is not threatened. In that circumstance, there is no reason to divert the trial court's resources to a "wasteful and time-consuming" inquiry into the propriety of the attorney's conduct rather than to employ the disciplinary machinery of the bar for that purpose (see *Nyquist*, 590 F.2d at 1247-48 (Mansfield, J., concurring)). Nor is there reason in that situation to deprive a client of the lawyer of his choice. And, of course, if an attorney's misconduct *is* "likely to infect future proceedings," the standard empowers the trial court to order disqualification. This standard is proper: it is well-calibrated to guard the judicial process against the evils both of attorney misconduct and abusive motions to disqualify, while at the same time giving due protection to the interest of a party in having the lawyer of his choice.[36]

2. If the standard just discussed were not upheld, it would become necessary to determine whether Butler's conduct violated Canon 20, an issue the court below did not decide (Pet. App. 71a). For, at a minimum, disqualification of an attorney could not be permitted without a determination that the attorney has violated some legal or ethical norm. Canon 20 provides as follows:

> Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due

[36] The Ninth Circuit, in *American Protection Ins. v. MGM Grand Hotel*, slip op. at 9-10, has recently joined the Second Circuit and the court below in adopting this standard. This standard is consistent with this Court's "adher[ence] to the principle that only '[t]he least possible power adequate to the end proposed' should be used in contempt cases." *United States v. Wilson*, 421 U.S. 309, 319 (1975). The Court has approved postponing punishment of attorneys for contempt until after trial, so as not to deprive a party of his counsel or otherwise to prejudice the party's case on the merits; the Court has found such restraint fully consistent with "the integrity and efficiency of the trial process." *Sacher v. United States*, 343 U.S. 1, 10 (1952); see *Taylor v. Hayes*, 418 U.S. 488, 497-98 (1974).

> administration of justice. Generally, they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement. [Pet. App. 95a-96a].

On its face, the rule has no application here. It applies to "newspaper discussion *of* pending litigation"—or *"as to* pending or anticipated litigation" (emphasis added). The last sentence of the rule corroborates that limited scope. Thus, the rule does not by its terms purport to bar a lawyer from speaking out on an issue of public importance that transcends any particular trial simply because that lawyer is involved in pending litigation that relates to the issue.

Moreover, as the court below recognized (Pet. App. 54a, footnote omitted):

> The Legal Ethics Committee of the District of Columbia Bar has emphasized with respect to [Canon 20] that it "would hesitate to interpret the Code of Professional Responsibility or the Canons of Professional Ethics in such a way as to thwart the communication of accurate factual information regarding legal proceedings to the press in the absence of a *substantial threat to the due administration of justice.*" Formal Op. 8 (1975) (emphasis added).

The facts here—that "the resulting article was far from inflammatory" and indeed was "balanced" in nature, and that any conceivable prejudice from the article could be handled by ordinary jury *voir dire*—leave no room for finding "a substantial threat to the due administration of justice" (Pet. App. 54a-55a).

3. If Canon 20 were interpreted to prohibit Butler's expression, the question would then arise whether, so construed, Canon 20 is consistent with the First Amendment. There can be no doubt that there is a powerful

public interest in communications of the type Butler made in this case. Communications regarding the dangers of a drug, and urging the FDA to remove that drug from the market, relate to issues of broader public importance than simply the conduct or outcome of a particular trial. Yet, because Butler was an attorney with an imminent trial in a Bendectin case, petitioner contends that Butler forfeited the right to participate in the public debate on the dangers of Bendectin, and to bring to light in that debate all the information he believed supported his position.

This Court has never considered the restrictions that pending civil litigation may impose on an attorney's First Amendment freedom to speak on issues of broad public concern related to, but transcending, a lawsuit. The lower courts that have addressed this issue have uniformly held that such expression may not constitutionally be restricted by general disciplinary rules. In *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 258 (7th Cir. 1974), *cert. denied*, 427 U.S. 912 (1976), for example, the court explained:

> Civil litigation in general often exposes the need for governmental action or correction. Such revelations should not be kept from the public. Yet it is normally only the attorney who will have the knowledge or realize its significance. . . . The lawyer representing the . . . plaintiffs may be the only articulate voice for that side of the case. Therefore, we should be extremely skeptical about any rule that silences that voice.
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> • • • •
>
> For instance, in an airplane crash case an attorney who discovered that unsafe flight procedures were in effect and were being condoned by government regulatory agencies could not impart this vital information to the public. . . . The need for informed and public discussion of this type of issue far outweighs any possible benefit that might accrue in terms of maintaining the laboratory conditions of a civil trial.

Accord, e.g., Hirshkop v. Snead, 594 F.2d 356, 373 (4th Cir. 1979) (*en banc*); *Ruggieri v. Johns-Manville Prod-u-'s Corp.*, 503 F. Supp. 1036 (D.R.I. 1980); *cf. CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975) (vacating gag order in civil case).

There may be instances when such speech would pose a serious threat to the fair administration of justice. *Cf. Nebraska Press Association v. Stuart*, 427 U.S. 539, 564 (1976); *id.* at 601 n.27 (Brennan, J., concurring); *Sheppard v. Maxwell*, 384 U.S. 333, 361 (1966).[37] Such a situation would require a court to reconcile two competing and fundamental interests, and would most appropriately be addressed by a court order expressly defining the limits on attorney speech that are warranted in the particular case. But, there is no occasion to resolve that balance here. The district court did not find a threat to the administration of justice from Butler's speech, and, as the court of appeals explained, no such finding could be made on the facts of this case. Pet. App. 54a-55a; see *supra* at 43 & n.33.[38] Without a showing that Butler's speech, or the single balanced article that resulted, actually threatened to impair a fair trial,

[37] In *Nebraska Press* and *Sheppard*, the Court suggested possible restrictions on attorney speech in the context of criminal cases, where the guarantees of the Fifth and Sixth Amendments apply. And even in those cases, the Court did not suggest that a blanket restriction on speech by trial participants would be appropriate in all circumstances. *Nebraska Press*, 427 U.S. at 554 ("pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial"). *Cf. Hirshkop v. Snead*, 594 F.2d at 373 (distinguishing restrictions on attorney speech in civil and criminal cases); *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 257-58 (same).

[38] The court of appeals was fully entitled to assess the probable impact of Butler's speech. Indeed, the court had "an obligation to 'make an independent examination of the whole record' in order to make sure 'that the judgment [did] not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union*, —— U.S. ——, 104 S. Ct. 1949, 1958 (1984). *Accord, e.g., Wood v. Georgia*, 370 U.S. 375, 386-88 (1962); *Pennekamp v. Florida*, 328 U.S. 331, 335, 346-50 (1946).

Butler's communication on the dangers of Bendectin cannot, consistent with the First Amendment, support the sanction of disqualification. *Wood v. Georgia*, 370 U.S. at 386-89.[39]

[39] As the court of appeals noted, the trial court based its disqualification of Butler solely on its "finding that Butler's intent was to 'prejudice the defendant's case' and circumvent the court's evidentiary rulings." Pet. App. 51a. While that finding of intent is itself open to serious question, *id.*, even the trial court did not find that that was Butler's *only* motive. Butler's avowed motivation was his belief, based on over two years of research, that Bendectin was a dangerous drug that should be taken off the market without further delay (see *supra* at 18-19); the district court did not find that Butler lacked that motivation. See Pet. App. 19a, 51a, 78a.

In any event, the motivation for Butler's speech cannot constitute a proper basis for his disqualification. We are unaware of any case in which the Court has held that a speaker's *motive* may justify restriction of his speech even though the content of his speech contributes to debate on an issue of significant public concern. Indeed, if such an inquiry were permitted, it would chill protected speech. As the Court has often recognized, "[t]he threat of sanctions may deter [the] exercise of [First Amendment freedoms] almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963). The threat of sanctions would be particularly real where, as here, the sanctions follow from a standardless, *post hoc* inquiry into the speaker's motive. The nature of the evidence upon which a finding of bad intent was made here dramatizes the point: a lawyer motivated solely by innocent purpose would inevitably generate the same record as exists here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

DISTRICT OF COLUMBIA
CODE OF PROFESSIONAL RESPONSIBILITY

DR 7-101. Representing a Client Zealously.

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).

(B) In his representation of a client, a lawyer may:

(1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.

(2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

DR 7-102. Representing a Client Within the Bounds of the Law.

* * * *

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same.

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

No. 84-127 (8)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARDSON-MERRELL INC.,

Petitioner,

v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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28

TABLE OF CONTENTS

	PAGE
Misstatements in Respondents' Counter-Statement of the Case	2
A. The Decision of the District Court	2
B. The Decision of the Court of Appeals	5
ARGUMENT	
Point I—The Decision Below Wrongly Abolishes as a Matter of Law the Established Authority of the District Courts to Disqualify Counsel for Misconduct	6
Point II—The Court Below Brushed Aside the Clearly Erroneous Rule and the Abuse of Discretion Standard of Review	7
A. The Clearly Erroneous Rule	7
B. The Abuse of Discretion Standard	8
Point III—The Court Below Wrongly Held That an Attorney May Not Be Disqualified for Releasing Material Which Has Been Ruled Inadmissible With Intent to Circumvent the Ruling and to Prejudice an Opponent	8
Point IV—Attorney Disqualification Orders in Civil Cases Are Not Subject to Interlocutory Appeal Under *Flanagan v. United States*, 104 S. Ct. 1051 (1984)	11
CONCLUSION	15
APPENDIX—Response to Respondents' Factual Arguments	1a

TABLE OF AUTHORITIES

Cases PAGE

Atchison, T. & S.F. Ry. v. Jackson, 235 F.2d 390 (10th Cir. 1956) 4

Bridges v. California, 314 U.S. 252 (1941) 8-9

Brown v. Supreme Court, 359 F. Supp. 549 (E.D. Va.), *aff'd*, 414 U.S. 1034 (1973) 4

Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950) 4

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 12

Craig v. Harney, 331 U.S. 367 (1947) 9

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) 14

Flanagan v. United States, 104 S. Ct. 1051 (1984) 11, 12, 14

Galahad v. Weinshienk, 555 F. Supp. 1201 (D. Colo.), *aff'd*, No. 83-1115 (10th Cir. Sept. 2, 1983), *cert. denied*, 104 S. Ct. 1907 (1984) 4

Geders v. United States, 425 U.S. 80 (1976)..... 14

Gough v. Perkowski, 694 F.2d 1140 (9th Cir. 1982) 13

In re Belli, 371 F. Supp. 111 (D.D.C. 1974)..... 4

In re D. H. Overmyer Telecasting Co., 29 B.R. 647 (Bkrtcy. Ct. N.D. Ohio 1983), *aff'd*, No. 83-3771 (6th Cir. Nov. 5, 1984) 4

In re Evans, 524 F.2d 1004 (5th Cir. 1975) 4

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 9

Leis v. Flynt, 439 U.S. 438 (1979) 3, 4

PAGE

Lusardi v. Xerox Corp., 747 F.2d 174 (3d Cir. 1984) 12

Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) 12

Norfolk & W. Ry. v. Beatty, 44 F. Supp. 234 (S.D. Ill.), *aff'd*, 423 U.S. 1009 (1975) 4

Parker v. Levy, 417 U.S. 733 (1974) 11

Pennekamp v. Florida, 328 U.S. 331 (1946)..... 9

Renegotiation Board v. Bannercraft Clothing Co., Inc., 415 U.S. 1 (1974)..... 12

Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980)..... 14

Ross v. Reda, 510 F.2d 1172 (6th Cir.), *cert. denied*, 423 U.S. 892 (1975)..... 3-4, 10

Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968) ... 4

Sheppard v. Maxwell, 384 U.S. 333 (1966)..... 2-3, 10

Silverman v. Browning, 414 F. Supp. 80 (D. Conn.), *aff'd*, 429 U.S. 876 (1976) 4

Spanos v. Skouras Theatres Corp., 364 F.2d 161, *cert. denied*, 385 U.S. 987 (1966) 4

State v. Kavanaugh, 52 N.J. 7, 243 A.2d 225, *cert. denied*, 393 U.S. 924 (1968)..... 4

State v. Van Duyne, 43 N.J. 369, 204 A.2d 841 (1964), *cert. denied*, 380 U.S. 987 (1965) 2, 10

Strickland v. Washington, 104 S. Ct. 2052 (1984).. 13

Thomas v. Cassidy, 249 F.2d 91 (4th Cir. 1957), *cert. denied*, 355 U.S. 958 (1958)..... 4

PAGE

United States v. Cronic, 104 S. Ct. 2039 (1984) ... 13

Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 11

Wood v. Georgia, 370 U.S. 375 (1962) 9

Rules

District of Columbia Code of Professional Responsibility, Disciplinary Rule 1-102 3

District of Columbia Code of Professional Responsibility, Disciplinary Rule 7-102 3

District of Columbia Code of Professional Responsibility, Disciplinary Rule 7-102(B) 3

District of Columbia Code of Professional Responsibility, Disciplinary Rule 7-106(C) 10

District of Columbia Code of Professional Responsibility, Disciplinary Rule 7-107(H) (ABA Canons of Professional Ethics, Canon 20) 2, 10, 11

District of Columbia Code of Professional Responsibility, Disciplinary Rule 7-108(A) 10

District of Columbia Code of Professional Responsibility, Disciplinary Rule 7-108(B) 10

Other Authorities

Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747 (1982) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-127

RICHARDSON-MERRELL INC.,

Petitioner,

v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

More than half of respondents' brief ("Res. Br.") is devoted to a lengthy Counter-Statement of the Case (Res. Br. 1-26), which reargues the facts found by the District Court. However, resolution of the important legal issues presented by the petition for certiorari herein does not require this Court to engage in *de novo* reconsideration of the findings of fact made by the District Court, none of which was found to be clearly erroneous by the Court of Appeals.

Misstatements in Respondents' Counter-Statement of the Case

Respondents assert that the material facts on this appeal are "essentially undisputed" (Res. Br. 1; *see also* Res. Br. 1 n.1, 10, 24, 25 n.21, 27, 40). On the contrary, as shown in petitioner's main brief, the record presented serious issues of credibility as to the intent of both Butler and Allis, and the District Court resolved those issues adversely to respondents (Pet. Br. 7-8, 12-16). Because respondents' attempt to reargue the facts found by the District Court has no bearing on the legal issues before this Court, we have corrected the most serious misstatements in the Appendix to this reply brief.

A. The Decision of the District Court

Respondents mischaracterize the central holdings of the District Court. They argue that the District Court made no finding that Butler or Allis violated any ethical standard (Res. Br. 19, 26, 38). This argument is misleading. While the District Court did not characterize the misconduct of Butler and Allis in terms of specific Disciplinary Rules, the misconduct found by the District Court clearly established serious violations of the Code of Professional Responsibility. In the case of Butler, the District Court found a deliberate attempt to prejudice prospective jurors (Pet. App. 77a-78a), conduct which has been held to violate Canon 20 of the Canons of Professional Ethics (now Disciplinary Rule 7-107(H) of the District of Columbia Code of Professional Responsibility) at least since *State v. Van Duyne*, 43 N.J. 369, 389, 204 A.2d 841, 852 (1964), *cert. denied*, 380 U.S. 987 (1965), which was cited with approval by this Court in *Sheppard v. Maxwell*, 384

U.S. 333, 361 (1966).* In the case of Allis, the District Court found a deliberate attempt to thwart a true investigation of a crucial witness (Pet. App. 77a); such conduct has long been held to violate the basic obligations of an attorney (*see* Pet. Br. 20-21 n.*), and constitutes a violation of Disciplinary Rules 1-102 and 7-102 of the District of Columbia Code of Professional Responsibility (Pet. App. 91a, 92a-94a).**

Respondents also argue that the "linchpin" of the District Court's decision was its statement (Pet. App. 75a) that attorneys who have been admitted *pro hac vice* for purposes of a particular case may be disqualified for misconduct falling short of an ethical violation (Res. Br. 22; *see also* Res. Br. 19, 26, 38, 41). This statement has no determinative significance in this case, because the findings of the District Court clearly establish ethical violations of the first magnitude. Therefore, while petitioner believes that the Court of Appeals spoke too broadly in holding that the standard for disqualification of an attorney admitted *pro hac vice* may never differ from that for a regularly admitted attorney (Pet. App. 34a-35a), this issue need not be reached in the present case.***

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* The District Court noted that one of the responsibilities of an attorney as an officer of the Court "is to refrain from any conduct which will obstruct the administration of justice, such as the circumvention of a court's ruling on the admissibility of evidence" (Pet. App. 77a).

** Respondents correctly state (Res. Br. 1 n.*) that the text of Disciplinary Rule 7-102(B) of the District of Columbia Code of Professional Responsibility is incorrectly set forth at Pet. App. 93a-94a. Petitioner relied upon the published text of the Disciplinary Rule, which is incorrect. The error has no impact upon the issues presented by this appeal, because petitioner has not relied upon the omitted portion of Disciplinary Rule 7-102(B).

*** It is well established that admission to practice *pro hac vice* is not a right but a privilege, which rests in the sound discretion of the District Court. *See, e.g., Leis v. Flynt*, 439 U.S. 438, 441-44 (1979); *Ross v. Reda*, 510 F.2d

Respondents argue that the District Court held that Allis had an affirmative duty to investigate possible fraud by his own client, and that he was guilty of misconduct because he failed to carry out this affirmative duty (Res. Br. 19-20, 23-24, 40-41). The Court of Appeals also adopted this interpretation of the District Court's holding (Pet. App. 41a-42a). However, it is a misreading of the opinion of the District Court. That opinion makes clear that it was respondents who argued that Allis was merely fulfilling his responsibility under the Code of Professional Responsibility to investigate Ms. Janowski's statements (Pet. App. 75a-76a). The District Court found that

1172, 1173 (6th Cir.), *cert. denied*, 423 U.S. 892 (1975); *Thomas v. Cassidy*, 249 F.2d 91, 92 (4th Cir. 1957), *cert. denied*, 355 U.S. 958 (1958); *Atchison, T. & S.F. Ry. v. Jackson*, 235 F.2d 390, 393 (10th Cir. 1956); *Galahad v. Weinshienk*, 555 F. Supp. 1201, 1205-06 (D. Colo.), *aff'd*, No. 83-1115 (10th Cir. Sept. 2, 1983), *cert. denied*, 104 S. Ct. 1907 (1984); *Silverman v. Browning*, 414 F. Supp. 80, 85-88 (D. Conn.), *aff'd*, 429 U.S. 876 (1976); *Norfolk & W. Ry. v. Beatty*, 400 F. Supp. 234, 236-38 (S.D. Ill.), *aff'd*, 423 U.S. 1009 (1975); *In re Belli*, 371 F. Supp. 111, 112 (D.D.C. 1974); *Brown v. Supreme Court*, 359 F. Supp. 549, 558-59 (E.D. Va.), *aff'd*, 414 U.S. 1034 (1973); *In re D. H. Overmyer Telecasting Co.*, 29 B.R. 647, 649 (Bkrtcy. Ct. N.D. Ohio 1983), *aff'd*, No. 83-3771 (6th Cir. Nov. 5, 1984). *But see In re Evans*, 524 F.2d 1004, 1007-08 (5th Cir. 1975); *Sanders v. Russell*, 401 F.2d 241, 244-48 (5th Cir. 1968); *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 169-71 (2d Cir.), *cert. denied*, 385 U.S. 987 (1966), *questioned in Leis v. Flynt*, 439 U.S. 438, 442 n.4 (1979).

In light of this well-established principle, it would appear that the District Court, in exercising its discretion whether or not to invoke the remedy of disqualification, should be free to take into account the fact that an attorney has been admitted *pro hac vice*, particularly because the disciplinary measures which may otherwise represent alternatives to disqualification are likely to be less effective in the case of an attorney from another jurisdiction. No other court appears to have adopted the *per se* rule of the court below that the standard for disqualification may never be different for an attorney admitted *pro hac vice*. *Cf. Cooper v. Hutchinson*, 184 F.2d 119, 123 (3d Cir. 1950); *State v. Kavanaugh*, 52 N.J. 7, 19, 243 A.2d 225, 232, *cert. denied*, 393 U.S. 924 (1968).

the facts did not support this argument (Pet. App. 76a). The District Court did not hold, as respondents contend, that Allis was guilty of misconduct merely for failing to make a true investigation. Rather, it held that his misconduct consisted of an affirmative "attempt to thwart" such a true investigation (Pet. App. 77a).

The District Court expressly found that if Butler and Allis were disqualified, "remaining counsel can provide plaintiffs with competent counsel" (Pet. App. 78a). The Court of Appeals did not reverse or question this finding, but simply ignored it (Pet. Br. 34). Respondents argue that Butler and Allis were plaintiffs' principal trial counsel (Res. Br. 21 n.20, 28). However, respondents do not, and could not, contend that their six remaining counsel would not be competent to represent them at the trial. Two of respondents' remaining counsel, Allen T. Eaton, Esq. and George A. Kokus, Esq., are among the five lead counsel for plaintiffs in the Multidistrict proceeding in the Southern District of Ohio, which involves more than 600 Bendectin cases (*see* Pet. Br. 3 n.*).

B. The Decision of the Court of Appeals

Respondents repeatedly assert that the Court of Appeals did not modify any of the factual findings of the District Court, but instead "accepted the factual findings of the district court and relied upon additional facts that were undisputed in the record of the case" (Res. Br. 24; *see also* Res. Br. 1 n.1, 25 n.21, 27, 40). This assertion is inaccurate, as is apparent from a comparison of the opinions of the District Court and the Court of Appeals.

As to Allis, the District Court found an intent to "thwart a true investigation of a crucial witness in this

case" (Pet. App. 77a), while the Court of Appeals found that his actions "can more easily be understood to reflect a desire to get at the truth and to protect the interest of his client rather than to 'thwart a true investigation' " (Pet. App. 47a). The trial court further found that Allis intended to procure a retraction of statements already made by his secretary to the defendant (Pet. App. 76a), an issue which even the Court of Appeals admitted was disputed (Pet. App. 17a n.34), and listed four factors supporting its findings as to Allis's intent (Pet. App. 76a-77a), each of which the Court of Appeals disputed (Pet. App. 43a-48a).

As to Butler, the District Court found an intent to circumvent its orders and to prejudice the defendant (Pet. App. 78a), a finding which the Court of Appeals went out of its way to question (Pet. App. 51a). The Court of Appeals also made a *de novo* finding of absence of prejudice to the defendant (*ibid.*), despite petitioner's specific request for a remand on this issue (Pet. Br. 18-19).

ARGUMENT

POINT I

The Decision Below Wrongly Abolishes as a Matter of Law the Established Authority of the District Courts to Disqualify Counsel for Misconduct.

Respondents deny that the Court of Appeals has in effect foreclosed disqualification as a remedy for misconduct by counsel (Res. Br. 38-39). Respondents argue that the Court of Appeals held that disqualification for misconduct is permissible when (1) an attorney has violated

legal or ethical norms, *and* (2) the violation is likely to infect future proceedings (Res. Br. 27, 38-39).* This argument is inconsistent with the restrictive holding of the Court of Appeals that disqualification should be denied "[e]xcept in cases of *truly egregious misconduct* likely to infect future proceedings" (Pet. App. 38a; emphasis supplied). Respondents do not deny that, as a practical matter, this holding effectively forecloses disqualification as a remedy for misconduct.

The remedy of disqualification is long established (Pet. Br. 26). Unlike the other remedies available to the courts to deal with misconduct, it is prospective and preventive in nature, rather than retrospective and punitive (Pet. Br. 28-29). It is at once more lenient and more effective than such remedies as contempt and disbarment (Pet. Br. 28). Neither respondents nor the Court of Appeals has explained why this long-standing remedy for misconduct should be abolished.**

POINT II

The Court Below Brushed Aside the Clearly Erroneous Rule and the Abuse of Discretion Standard of Review.

A. The Clearly Erroneous Rule

Respondents argue that the Court of Appeals "was meticulous in following the 'clearly erroneous' rule

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* Even under this view of the holding of the Court of Appeals, there should at least have been a remand to the District Court for findings of fact as to whether this standard was met (Pet. Br. 30).

** Ordinarily, the question whether misconduct is "truly egregious" is within the discretion of the District Court; in this case, however, the Court of Appeals purported to hold as a matter of law that disqualification was improper (Pet. App. 56a).

throughout its opinion" (Res. Br. 40). This argument is disingenuous. The Court of Appeals gave lip service to the rule, but it departed sharply from the facts found by the District Court, although it found none of them to be clearly erroneous (*see* pp. 5-6 *supra*). The plainest proof of this is the very fact that respondents have felt compelled to argue that there were no disputed issues of material fact in this case (*see* p. 2 *supra*).

B. The Abuse of Discretion Standard

Respondents argue that the abuse of discretion standard of review was not violated because the Court of Appeals held as a matter of law that the remedy of disqualification could not be applied in this case (Res. Br. 39-40 n.31). This argument misconceives the nature of the abuse of discretion standard. The essence of the abuse of discretion standard is that the District Court has the power to choose an appropriate remedy in a particular case. *See, e.g.*, Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 761 (1982). Under the abuse of discretion standard, whether or not misconduct is "truly egregious" (Pet. App. 38a) is for the evaluation of the District Court, not the Court of Appeals. Where, as here, the appellate court forecloses a particular remedy in a particular case, the abuse of discretion standard has been abrogated.

POINT III

The Court Below Wrongly Held That an Attorney May Not Be Disqualified for Releasing Material Which Has Been Ruled Inadmissible With Intent to Circumvent the Ruling and to Prejudice an Opponent.

Respondents and the *amici* rely upon the line of cases beginning with *Bridges v. California*, 314 U.S. 252

(1941), and continuing through *Pennekamp v. Florida*, 328 U.S. 331 (1946), and *Craig v. Harney*, 331 U.S. 367 (1947), to *Wood v. Georgia*, 370 U.S. 375 (1962), and *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), for the proposition that speech concerning the administration of justice may be restricted only on the basis of a serious and imminent danger to the administration of justice (Res. Br. 48-49; Post-ACLU Br. 7-10). This argument ignores the fact that all of those cases dealt with speech by the press and other parties unconnected with the courts, and did not deal with speech about pending judicial proceedings by lawyers and other officers of the courts involved in those proceedings.* Indeed, the Court emphasized the importance of this distinction in the most recent of this line of cases, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 (1978):

> "We do not have before us any constitutional challenge to a State's power to keep the Commission's proceedings confidential or to punish participants for breach of this mandate. Cf. *Nebraska Press Assn. v. Stuart*, 427 U. S. 539, 564 (1976); *id.*, at 601 n.27 (BRENNAN, J., concurring in judgment); *Wood v. Georgia*, 370 U. S. 375, 393-394 (1962). . . ." (Footnote omitted.)

The issue posed by this argument of respondents and the *amici* has importance far beyond the confines of this case. The power of the courts to restrain the calculated use of the press to communicate with potential jurors is essential to the administration of justice. Every eviden-

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* While *Wood v. Georgia*, 370 U.S. 375 (1962), involved statements by a county sheriff, the Court emphasized that the statements were made in a private capacity. 370 U.S. at 393-94.

tiary objection that is sustained by a court restrains the speech of the lawyers directed to jurors or prospective jurors. If the First Amendment gave lawyers a right to ignore such restraints, then a whole new mode of advocacy would be created, and the traditional power of the courts to administer the rules of evidence in proceedings before them would be rendered nugatory. Counsel for the *amici* profess surprise that "every evidentiary ruling might be considered a *de facto* gag order" (Post-ACLU Br. 13). As every trial lawyer knows, this is precisely the effect of an evidentiary ruling: once the court has sustained an objection to an item of evidence, it is unprofessional for counsel to seek to evade the court's ruling by using indirect means to place the evidence before the jury. *See* DR 7-106(C). 7-108(A), (B).

Both respondents and the *amici* argue that Butler's conduct did not violate Canon 20 of the Canons of Professional Ethics, as embodied in Disciplinary Rule 7-107(H) of the District of Columbia Code of Professional Responsibility (Res. Br. 45-46; Post-ACLU Br. 14-16). This argument ignores the language of Canon 20 and its judicial interpretation. Canon 20 expressly states that "[a]n *ex parte* reference to the facts should not go beyond quotation from the records and papers on file with the court . . . ." In *Sheppard v. Maxwell*, 384 U.S. 333, 361 (1966), this Court cited with approval the holding of *State v. Van Duyne*, 43 N.J. 369, 389, 204 A.2d 841, 852 (1964), *cert. denied*, 380 U.S. 987 (1965), that Canon 20 prohibits the divulging of prejudicial matters by a lawyer. *Cf.*, *e.g.*, *Ross v. Reda*, 510 F.2d 1172, 1173 (6th Cir.), *cert. denied*, 423 U.S. 892 (1975).

Finally, *amici* (but not respondents) argue that if Canon 20 were to be applied to Butler's conduct, it would

be void for vagueness (Post-ACLU Br. 18-20). This argument is wholly misplaced. As the District Court found, Butler intentionally sought to circumvent the Court's orders and prejudice the jury panel (Pet. App. 77a-78a). Accordingly, application of Canon 20 to Butler raises no problem of vagueness. *See*, *e.g.*, *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982); *Parker v. Levy*, 417 U.S. 733, 755-56 (1974).

POINT IV

Attorney Disqualification Orders in Civil Cases Are Not Subject to Interlocutory Appeal Under *Flanagan v. United States*, 104 S. Ct. 1051 (1984).

Respondents have become entangled in a hopeless contradiction with respect to the question whether a showing of prejudice is required to overturn an order disqualifying an attorney in a civil case. On the one hand, respondents argue that a showing of prejudice would be required and could not be made at the end of the case, so that such an order would be effectively unreviewable on appeal from a final judgment (Res. Br. 30-31). On the other hand, respondents maintain that a showing of prejudice would not be required (Res. Br. 29, 37). Respondents do not attempt to explain how both of these propositions could possibly be true at one and the same time.

The contradictions in which respondents have become enmeshed confirm the truth of the point made in our main brief (Pet. Br. 46), that the reasoning of *Flanagan v. United States*, 104 S. Ct. 1051 (1984), applies with equal force to attorney disqualification orders in civil cases. If a

showing of prejudice is required, it cannot be made until a final judgment has been entered; while if such a showing is not required, there can be no possible contention of unreviewability on appeal from a final judgment.

Respondents argue that attorney disqualification orders in civil cases should be subject to interlocutory appeal because of the economic burden that may be imposed by such an order (Res. Br. 28, 31 n.25). But attorney disqualification orders in criminal cases may also impose an economic burden upon defendants who must hire new counsel, and who may have paid substantial retainers to their disqualified counsel. More fundamentally, considerations of economic burden do not vitiate the final judgment rule. *See, e.g., Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). "Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Board v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 24 (1974), *citing Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52 (1938). "If the expense of litigation were a sufficient reason for granting an exception to the final judgment rule, the exception might well swallow the rule." *Lusardi v. Xerox Corp.*, 747 F.2d 174, 178 (3d Cir. 1984).

Respondents argue at length that it would be impossible to show prejudice from an attorney disqualification order at the end of the case because it would be a matter of sheer speculation whether or not the disqualified attorney would have done better than the successor attorney (Res. Br. 30-31). As noted in our main brief, the same argument was made by the losing parties in *Flanagan* (Pet. Br. 47), and respondents have not shown why the argument has merit here when it did not in *Flanagan*.

Moreover, even if respondents were correct in their premise that it would sometimes (or often) be a matter of speculation whether or not a showing of prejudice could be made at the end of the case, the conclusion drawn by respondents is neither the only nor the appropriate conclusion to be drawn from this premise. Common sense would suggest that if a claim of prejudice has no basis other than speculation, there has in fact been no prejudice. *Cf., e.g., Strickland v. Washington*, 104 S. Ct. 2052, 2067-69 (1984); *United States v. Cronic*, 104 S. Ct. 2039, 2049-51 (1984). The suggestion made by some Courts of Appeals, *see, e.g., Gough v. Perkowski*, 694 F.2d 1140, 1144 (9th Cir. 1982), that after judgment a court would be required to hypothesize a reenactment of the trial to compare differences in style and judgment between attorneys, is a straw man. Prejudice is not defined by such subtle differences. The question is simply whether the party was prejudiced by inability to secure the services of an attorney of comparable standing to the disqualified attorney. This can be demonstrated by objective, not speculative, proof.

Finally, respondents argue that disqualification orders in civil cases must be subject to interlocutory appeal because, respondents contend, disqualification motions are often made for tactical reasons (Res. Br. 33-35). Respondents ask rhetorically: "Why has petitioner devoted massive and expensive resources to the time-consuming effort to have Allis and Butler disqualified?" (Res. Br. 34-35.) The answer is not, as respondents suggest (Res. Br. 35), that petitioner fears that Butler and Allis will prove effective advocates on the merits of the case. Petitioner does not share respondents' stated belief in the unique abilities of Butler and Allis (Res. Br.

21 n.20, 28). Rather, the reason why this disqualification motion has been pursued by petitioner is that, having been made the victim of deliberate unprofessional conduct by Butler and Allis, petitioner wishes to foreclose similar misconduct in the future.

Respondents' argument that disqualification motions are made for tactical reasons ignores the fact that the question before the Court involves only the appealability of disqualification motions that have been granted by the District Courts. Respondents' apparent distrust of the District Courts runs counter to this Court's teaching that the District Courts have a central role in the administration of justice in the Federal judicial system. *See, e.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980); *Geders v. United States*, 425 U.S. 80, 86-87 (1976).

The trial judge has an extraordinarily difficult task. A District Judge must make many rulings before, during, and after trial. In the interests of effective administration of justice, the authority of the District Judge to make such rulings should be upheld, and the law should make clear to all concerned that the rulings the District Judge is called upon to make do, with very narrow and well defined exceptions, become the law of the case, subject only to eventual review on appeal after a final judgment has been rendered. *See, e.g., Flanagan v. United States*, 104 S. Ct. 1051, 1054 (1984). As this Court stated in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981), "[p]ermitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system."

CONCLUSION

For the reasons given in Points I-III above, the judgment of the Court of Appeals should be reversed, and the case should be remanded to the Court of Appeals with directions to affirm the order appealed from. In the alternative, for the reasons given in Point IV above, the judgment of the Court of Appeals should be reversed, and the case should be remanded to the Court of Appeals with directions to dismiss the appeal.

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Respectfully submitted,

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APPENDIX

Response to Respondents' Factual Arguments

A. Butler

Respondents assert that the "only evidence" as to Butler's intent was that contained in the two affidavits submitted by Butler to the District Court (Res. Br. 18). In actuality, as set forth in petitioner's main brief, these self-serving affidavits were no more than pleadings, unsupported by evidence and untested by cross-examination (Pet. Br. 7-8). The true evidence on this issue, all of which is ignored by respondents, included the timing of Butler's disclosure on the eve of trial, the restriction of the disclosure to a single newspaper, the admission of Butler's counsel that he could not explain the timing of Butler's actions (J. A. 138-139), and the fact that Butler had previously used the press to communicate inadmissible evidence to the jury in another case (J. A. 262-267).

In the face of these undeniable facts, the bald assertions of Butler's affidavits that "there was *no* motive other than to get the drug off the market", and that his communication "was not intended in *any* way to influence *any* juror or potential juror" (J. A. 137, 250; emphasis supplied), were lacking in credibility. The District Court's finding that Butler's purpose was to circumvent the Court's preclusion orders and prejudice the defendant (Pet. App. 77a-78a) was not reversed by the Court of Appeals (*see* Pet. App. 51a), as respondents admit (Res. Br. 25 n.22). It is established for purposes of this appeal.

B. Allis

Respondents' discussion of Allis's conduct simply ignores the controlling finding of the District Court that

Allis's intent was not "to ascertain the truth" but rather "to thwart a true investigation of a crucial witness in this case in pursuit of protecting the interests of his clients" (Pet. App. 77a). Instead, respondents present a summary of Allis's own testimony concerning the reasons for his conduct, which the District Court heard and considered at length, but ultimately did not accept.

As an underpinning of their justification for Allis's conduct, respondents allege that Mrs. Koller's claim to have taken Bendectin during the critical period was corroborated by physicians' medical records (Res. Br. 1-2). In fact, there is no such corroboration for Mrs. Koller's claim.* The only medical record as to drugs taken during the critical period fails to mention Bendectin at all.** The other records of Walter Reed Army Medical Center which could indicate whether or not Mrs. Koller took Bendectin during the critical period inexplicably disappeared after Mrs. Koller failed to find an early prescription (C.A. App. 1105, 1107, 1182-1187, 1189-1191, 1195-1197).***

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* In support of their allegation, respondents cite two medical records, one of which states that Mrs. Koller was taking Bendectin on November 20, 1978, almost a month after the critical period defined by respondents ended on or about October 23, 1978 (J. A. 147), while the other states that Mrs. Koller took Bendectin during the "1st trimester" (J. A. 149), which does not establish that Bendectin was taken during the critical period early in the first trimester.

** This record is a form filled out by Mrs. Koller when applying for obstetrical care on October 25, 1978, about two days after the end of the critical period defined by respondents (J. A. 144-145). The form inquired in two places as to medications taken since the last menstrual period (J. A. 144, Questions 11, 16). Mrs. Koller left both spaces blank (*ibid.*).

*** Mrs. Koller has given widely varying testimony as to how and when she first took Bendectin during her pregnancy with Anne Koller (C.A. App. 1140-1141, 1143-1144, 1151-1158, 1193-1194, 1198). Her husband has likewise changed his testimony on this subject (C.A. App. 1201-1223, 1235). Relatives and close associates of Mrs. Koller recall that Mrs. Koller was nauseated during the critical period of her pregnancy with Anne Koller, but do not recall her taking Bendectin or any other drug to alleviate her nausea during this period (C.A. App. 1259-1266, 1262-1263, 1266, 1269, 1271).

Respondents assert that "[u]nbeknownst to Allis, his secretary had been in regular contact with representatives of petitioner's counsel during the preceding four days" (Res. Br. 2).* In fact, as shown in petitioner's main brief, the credible evidence established that Allis knew on December 27, 1982 that Ms. Janowski had told defense counsel that the case was fraudulent (Pet. Br. 12), and the District Court found that the primary if not the sole reason for Allis's conduct on that date was to obtain a retraction of Ms. Janowski's statements to defense counsel (Pet. App. 76a).

Similarly, respondents allege that Allis "was concerned that petitioner was engaging in improper conduct, and he wished to get to the bottom of it to protect his clients' interests" (Res. Br. 3). The District Court made an entirely different finding as to Allis's purpose: "to thwart a true investigation of a crucial witness in this case in pursuit of protecting the interests of his clients" (Pet. App. 77a).

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* Contrary to respondents' suggestion (Res. Br. 2 n.2), the representatives of defendant who contacted Ms. Janowski during this period only attempted to locate her and verify her identity, and sought to avoid substantive discussions until Ms. Janowski had consulted independent counsel (Barnes 1/26/83 Dep. II-5-II-6, II-26; C.A. App. 1298-1299, 1303, 1325, 1332). Only after Ms. Janowski subsequently indicated that she would not consult Mr. Schuck, after the Butler firm took a statement from her, and after the Butler firm waived the attorney-client privilege did defendant attempt to take a statement (J. A. 23-27; Ryan 2/26/83 Dep. 141, 210, 260).

Similarly, although respondents allege that defense counsel made an *ex parte* communication to the District Court (Res. Br. 2-3), what in fact occurred was that defense counsel attempted to arrange for a conference with the Court, but were told by the District Court's law clerk that the Court was in recess until December 27, 1982 (J. A. 21, 94-95).

Respondents quote what purport to be representative excerpts from the tape recording made by Allis and Humphries on the evening of December 27, 1982 (Res. Br. 5-6). Respondents ignore the key portion of the tape recording, described in petitioner's main brief, in which Allis pulled out the statement he had prepared for Ms. Janowski to sign (Pet. Br. 14).*

Respondents attempt to palliate Allis's conduct by attacking that of others. They impugn the independence of Ms. Janowski's counsel, Carl J. Schuck, Esq. (Res. Br. 9 n.9), although the record shows that Mr. Schuck had no previous acquaintance with defense counsel and was recommended by Leonard S. Janofsky, Esq., a former President of the American Bar Association (J. A. 31). Respondents describe certain payments made at Mr. Schuck's instance to defray medical and living expenses of Ms. Janowski and legal expenses of her roommate (Res. Br. 12-13), without mentioning that it was Mr. Schuck who concluded that these payments were necessary to sustain Ms. Janowski and her premature infant until she could find new work, and who suggested that they should be divided between the parties, a suggestion which respondents rejected (J. A. 75-79). Finally, respondents argue in a footnote that defense counsel were or may have been guilty of unethical conduct (Res. Br. 14 n.13), without attempting to explain their failure to put these allegations to the test by making a motion in the District Court (*see* Pet. Br. 17-18 n.*).

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* Respondents also allude (Res. Br. 7-8 n.7) to a sheet on which Ms. Janowski had written out a purported conversation with Mrs. Koller (J. A. 28), without mentioning that Ms. Janowski afterwards testified under oath that she had in fact had such a conversation with Mrs. Koller (J. A. 52-53).

Respondents attack Ms. Janowski's credibility in a lengthy footnote which is riddled with inaccuracies (Res. Br. 11-12 n.10). These inaccuracies need not be detailed here, because, as the District Court stated, the issue before it was "not whether Krystyna Janowski is a credible witness or not, but whether or not whatever Krystyna Janowski knows or does not know plaintiffs have tried to keep from me" (J. A. 164). After hearing solely witnesses identified with the respondents, called by petitioner as adverse witnesses, the District Court concluded that this was what Allis had tried to do (Pet. App. 75a-77a).

Respondents' brief stresses the six character witnesses who appeared on behalf of Allis (Res. Br. 14), without mentioning that three of them, including Judge Van Dusen and Attorney General Van de Kamp, admitted that their opinion of Allis would be affected if the facts set forth in the District Court's order to show cause were accurate (C.A. App. 857-858, 862-863, 871). Similarly, respondents rely upon the testimony of two experts in legal ethics (Res. Br. 14) without disclosing that both of them testified that if the facts outlined in the order to show cause were assumed to be accurate, they would conclude that Allis's conduct violated the Code of Professional Responsibility (J. A. 312-313, 321-322). Indeed, the District Court rejected the opinions of the expert witnesses because they were unsupported by "the totality of the evidence" (Pet. App. 76a).

Thus respondents' effort to reargue the facts as to the conduct of Allis is flatly inconsistent with the express findings of the District Court.